EDITOR'S NOTE

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87-1102

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHARLES L. SCHLEIGH, ET AL.,

Petitioners,

v.

ESTHER V. REIGH, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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December 30, 1987

The Daily Record Co., Baltimore, MD 21202

34p9

QUESTION PRESENTED

Does the Civil Rights Attorney's Fees Act, 42 U.S.C. §1988, authorize the award of fees against a State found not to have violated federal law?

LIST OF PARTIES

The parties to this proceeding below were Esther V. Reigh, Ivery Mae Simkins, David Michael Simkins and Lenora C. Dannie, plaintiffs and then appellees/cross-appellants; and Charles L. Schleigh, in his official capacity as Principal Clerk of the District Court for Washington County, Maryland, Nancy Mueller, in her official capacity as Clerk of the District Court for Howard County, Maryland, and William A. Dorsey, in his official capacity as Administrative Clerk of the District Court for Baltimore City, Maryland, defendants and then appellants/cross-appellees.

TABLE OF CONTENTS

Cases

Constitutional Provisions,
Statutes, and Rules

Legislative History

IN THE SUPREME COURT OF THE UNITED STATES

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Clerks of the Maryland District Court (Charles L. Schleigh, Nancy Mueller and William A. Dorsey), respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of Maryland

have decided the issue raised by this petition. The opinion of the court of appeals holding that plaintiffs are entitled to attorneys' fees is reported at 829 F.2d 1334, and is reprinted in the separate appendix to this petition ("App.") at 1a-4a. The district court's memorandum and order awarding attorneys' fees is unreported and is reprinted at App. 5a-38a. The district court's order and judgment entering final judgment in favor of defendants and dismissing this action is unreported and is reprinted at App. 39a-40a.

The prior decision of the court of appeals, reversing the district court on the merits and upholding the constitutionality of Maryland's post-judgment attachment rules, is reported at 784 F.2d 1191, and is reprinted at App. 41a-73a; this Court's order denying certiorari is reported at 107 S.Ct. 167, and is reprinted at App. 74a. The decision of the district court holding that Maryland's

post-judgment attachment rules were unconstitutional is reported at 595 F.Supp. 1535, and is reprinted at App. 75a-164a. The permanent injunction and final order of the district court is unpublished and is reprinted at App. 165a-172a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on October 2, 1987. This petition was filed within 90 days of that judgment. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

The Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. §1988 provides, in relevant part, as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Respondents (plaintiffs below) filed this civil rights action under 42 U.S.C. §1983 in the United States District Court for the District of Maryland, seeking declaratory and injunctive relief against three state officials (the "State") in their respective official capacities as clerks of the Maryland District Court. Plaintiffs alleged (1) that Maryland's court rules governing post-judgment attachment procedures were unconstitutional, and (2) that in issuing attachment orders pursuant to those rules, the State deprived plaintiffs of their property without due process.

Prior to the decision of the district court holding the rules unconstitutional, 595 F.Supp. 1535 (App. 75a-164a), the rules were amended, effective July 1, 1984. Those rules require that judgment debtors be notified that federal and state exemptions may be

available and that a judgment debtor has the right to contest an attachment. The rules also provide that within 30 days of an attachment, a judgment debtor may file a motion claiming an exemption, and that if a hearing is requested, it must be held promptly.

On October 29, 1984, the district court found the amended (post-July 1, 1984) Maryland rules unconstitutional and entered judgment for the plaintiffs. 595 F.Supp. 1535 (App. at 75a-164a). The State appealed and the Fourth Circuit reversed, holding that the rules are constitutional. Reigh I, 784 F.2d 1191 (App. at 41a-73a).[1/]

Notwithstanding the Fourth Circuit's reversal and this Court's denial of certiorari, 107 S.Ct. 167 (1986), on plaintiffs' motion, the district court ordered the State

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[1/] This Court denied plaintiffs' petition for a writ of certiorari. 107 S.Ct. 167 (1986) (App. at 74a).

to pay the plaintiffs' attorneys' fees, finding "that this lawsuit actually caused no change in the Rules, but did achieve a limited change in the notice actually given to judgment debtors in post-judgment garnishments. Plaintiffs, therefore, are 'prevailing parties' to a very limited extent." (App. at 30a.) However, final judgment was entered in favor of the State and against the plaintiffs on all counts, and the case was dismissed with prejudice. (App. at 40a.)

The State appealed the district court's attorneys' fees award and plaintiffs cross-appealed, contending they were entitled to even more fees than those awarded, and that judgment should have been entered in their favor on certain issues. The Fourth Circuit affirmed in both appeals. Reigh II, 829 F.2d 1334 (App. at 1a-4a).[2/]

[2/] The fee award approved by the Fourth Circuit in Reigh II was $2,409.20. 829 F.2d at 1335 (App. at 2a). Plaintiffs have filed an application for an additional

REASONS FOR GRANTING THE WRIT

SUMMARY

The State petitions this Court to review this case for the reasons stated by Chief Justice Rehnquist, joined by Justice O'Connor, dissenting from the denial of certiorari in Long v. Bonnes, 455 U.S. 961 (1982). The Fourth Circuit continues to apply a "prevailing party" standard which is not consistent with the intent of the Civil Rights Attorney's Fees Act and which conflicts with the standard applied in other circuits. See 455 U.S. at 966-67.

Since Long v. Bonnes, the split in the circuits has grown and sharpened. Thus, there is even more reason why this conflict should be resolved. Now, seven circuits

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$7,751.22 in fees as compensation for defending that award in Reigh II. Notwithstanding the modest amount involved, the State pursues this matter because of the importance to the State of vindicating the principle that it should not be compelled to pay fees in a case that it won.

apply the rule rejected by the court below, and require that to be a "prevailing party" entitled to attorneys' fees, the plaintiff must establish that the defendant's conduct violated federal law. In direct conflict with that rule is the one followed by three circuits, including the Fourth Circuit in this case, requiring only some factual connection between a plaintiff's lawsuit and the defendant's post-litigation conduct, even when, as here, the law of the case is that the defendant did not violate federal law.

This case presents starkly the important question of whether the undisputed prevailing party on the merits must nevertheless pay plaintiffs' attorneys' fees. The Fourth Circuit's decision constitutes a serious misreading of the Attorney's Fees Act. As this Court's post-Long v. Bonnes decisions make clear, the Act was not intended to award fees against a state absent a determination

that the state violated federal law, nor was it designed to compel prevailing defendants, whose rights and legal positions were vindicated, to pay the losing plaintiffs' attorneys' fees.

Furthermore, the Fourth Circuit's decision is incompatible with the State's Eleventh Amendment immunity in federal court. While Congress may override that immunity, and it did so in the Attorney's Fees Act, Congress intended to override the State's immunity only when the State violated federal law. In Reigh I, the Fourth Circuit held the State did not violate federal law.

THIS CASE PRESENTS THE IMPORTANT AND UNRESOLVED QUESTION OF WHETHER THE CIVIL RIGHTS ATTORNEY'S FEES ACT AUTHORIZES THE AWARD OF FEES AGAINST THE STATE WHEN IT WAS FOUND NOT TO HAVE VIOLATED FEDERAL LAW.

I. The Circuits Are Sharply Split On The Standard To Be Applied In Determining A "Prevailing Party".

In affirming the district court's award of attorneys' fees, the Fourth Circuit

applied a purely factual prevailing party standard of whether "plaintiffs' actions caused defendant to remedy his errant ways." Reigh II, 829 F.2d at 1335 (App. at 3a). Two other circuits (the Second and Third) apply the prevailing party standard applied by the Fourth Circuit in this case, holding that merely an identifiable factual connection, as distinguished from a legally required one, between the lawsuit and the action taken by the defendant entitles the plaintiff to fees as a prevailing party.[3/] In contrast, seven circuits (the First, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth) hold that to be a

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3/ See, e.g., Gerena-Valentin v. Koch, 739 F.2d 755, 758 (2nd Cir. 1984) (holding that "the prevailing party must show a causal connection between the relief obtained and the litigation in which fees are sought"); N.A.A.C.P. v. Wilmington Medical Center, Inc., 689 F.2d 1161, 1167 (3rd Cir. 1982), cert. denied, 460 U.S. 1052 (1983) ("as long as they [plaintiffs] can establish causation between their litigation and 'some of the benefits' they sought, they have prevailed for purposes of section 1988") (citation omitted); Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979), see n.7, infra.

prevailing party for purposes of the Attorney's Fees Act, the plaintiff not only must cause the relief secured, but also must be legally entitled to that relief.[4/] The

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[4/] See Nadeau v. Helgemoe, 581 F.2d 275, 281 (1st Cir. 1978) (setting forth two-pronged test requiring that the lawsuit be causally related to the benefits received and that the benefits be required by law); Williams v. Leatherbury, 672 F.2d 549, 551 (5th Cir. 1982) ("a plaintiff may . . . recover attorney's fees if he can show both a causal connection between the filing of the suit and the defendant's action and that the defendant's conduct was required by law")(emphasis added), citing Nadeau v. Helgemoe; Fiarman v. Western Publishing Company, 810 F.2d 85, 86 (6th Cir. 1987) (stating that the Sixth Circuit has adopted the two-part test set forth in Nadeau v. Helgemoe); Palmer v. City of Chicago, 806 F.2d 1316, 1322 (7th Cir. 1986), cert. denied, 107 S.Ct. 2180 (1987) ("'[i]f it has been judicially determined that defendants' conduct, however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense'") quoting Nadeau v. Helgemoe; United Handicapped Federation v. Andre, 622 F.2d 342, 346 (8th Cir. 1980) (adopting Nadeau standard); Jensen v. City of San Jose, 806 F.2d 899, 901 (9th Cir. 1986) (en banc) ("'when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law. . . . These policy considerations which support the award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant'"); Supre v. Ricketts, 792 F.2d 958, 962 (10th Cir. 1986) (stating that the plaintiff "must also demonstrate that the defendant's conduct in response to the lawsuit was

confusion on this point is confirmed by the fact that different panels within several circuits apply these conflicting standards inconsistently.[5/]

The extraordinary confusion in this important and intensely litigated area of the law is demonstrated further by the fact that the specific holding of the court below -- that plaintiffs are prevailing parties even though their award of §1983 relief was reversed in its entirety on appeal -- is in

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required by the Constitution or federal law, i.e. the defendant's actions must be legally required").

5/ Compare Miller v. Staats, 706 F.2d 336, 341-42, nn. 31 and 34 (D.C. Cir. 1983) with Commissioners Court of Medina County v. United States, 683 F.2d 435, 441 (D.C.Cir. 1982); compare Fields v. City of Tarpon Springs, 721 F.2d 318, 321 (11th Cir. 1983) with Doe v. Busbee, 684 F.2d 1375, 1381 (11th Cir. 1982). The Fifth Circuit has also been inconsistent in applying the prevailing party standard. See Hennigan v. Quachita Parish School Board, 749 F.2d 1148, 1151 (5th Cir. 1985) ("The Fifth Circuit opinions have not articulated a consistent standard for measuring whether a plaintiff whose efforts did not result in a judgment in his favor has succeeded sufficiently to be a prevailing party.").

conflict with direct holdings of panels in at least four federal circuits.[6/]

Two justices of this Court, dissenting from the denial of certiorari in Long v. Bonnes, 455 U.S. 961 (1982) (Rehnquist, J., joined by O'Connor, J., dissenting), criticized the prevailing party standard applied by the Fourth Circuit, recognized that a conflict existed between the standard applied by the Fourth Circuit and that applied by the First Circuit, id. at 966-67, and emphasized the need for this Court to resolve this conflict:

> It is clear beyond peradventure that unless an action brought by a private litigant contains some basis in law for the benefits ultimately received by that litigant, the litigant cannot be said to have enforced the civil rights laws or to have promoted their policies for the benefit of the public at large. The [Fourth Circuit's] Bonnes

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6/ See Turner v. McMahon, 830 F.2d 1003, 1009 (9th Cir. 1987); Merkil v. Scovill, 787 F.2d 174, 180-81 (6th Cir.), cert. denied, 107 S.Ct. 585 (1986); Harris v. Pirch, 677 F.2d 681, 689 (8th Cir. 1982); Ryan v. Mansfield State College, 677 F.2d 354, 355 (3rd Cir. 1982).

standard,[7/] at least as applied in No. 80-2153, seems largely to disregard this central purpose of §1988, awarding attorney's fees even if the discernible benefit was conferred gratuitously by the defendant or was undertaken simply to avoid further litigation expenses. I would grant certiorari in one or both of these cases to resolve the conflict among the Circuits and to establish a standard consistent with the purposes of the Act.

Id. at 967.

7/ In Bonnes v. Long, 599 F.2d 1316, 1319 (4th Cir. 1979), the Fourth Circuit set forth the prevailing party standard used in that circuit:

> If, as in this case, there is initially a genuine dispute as to whether the plaintiff fee claimant is a 'prevailing party', inquiry on that question might well proceed first. This inquiry is properly a pragmatic one of both fact and law that will ordinarily range outside the merits of the basic controversy. Its initial focus might well be on establishing the precise factual/legal condition that the fee claimant has sought to change or affect so as to gain a benefit or be relieved of a burden. With this condition taken as a benchmark, inquiry may then turn to whether as a quite practical matter the outcome, in whatever form it is realized, is one to which the plaintiff fee claimant's efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when measured against the benchmark condition.

Since Long v. Bonnes, the conflict between the circuits has increased: five circuits have followed the First Circuit and adopted the rule that a prevailing party must be legally entitled to the relief secured, see n.4, supra, and two circuits have followed the Fourth Circuit's lead in Bonnes. See nn.3, 7, supra.[8/]

It is a matter of great public importance to establish a uniform prevailing party standard and eliminate the inconsistent judg-

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[8/] The confusion in the lower federal courts reflected by this increasing split is exacerbated further by widespread disagreement on the amount of success a plaintiff must meet to qualify as a prevailing party. While this Court in Hensley v. Eckerhart, 461 U.S. 424 (1983), observed that one view requires such parties to succeed on "any significant issue", id. at 433, quoting Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978), it also noted that the Fifth Circuit requires a plaintiff to be successful on "the central issue". 461 U.S. at 433, n.8, citing Taylor v. Sterrett, 640 F.2d 663, 669 (5th Cir. 1981). Since Hensley, appellate courts from at least two other federal circuits have adopted "the central issue test". See Taylor v. City of Fort Lauderdale, 810 F.2d 1551, 1555-56 (11th Cir. 1987); Kentucky Association for Retarded Citizens, Inc. v. Conn, 718 F.2d 182, 186-87 (6th Cir. 1983).

ments resulting from the plainly conflicting standards now applied in the lower federal courts.[9/] The Civil Rights Attorney's Fees Act plays a central role in the litigation of thousands of important cases in the federal courts. "As more and more litigation has ensued in which claims for attorney's fees are made under the Act, however, more troublesome questions as to when a party has 'prevailed' have confronted the Courts of Appeals." Long v. Bonnes, 455 U.S. at 962 (Rehnquist, J., and O'Connor, J., dissenting). This Court should grant review in this case "to establish a [prevailing party] standard consistent with the purposes of the Act." Id. at 967.

9/ The persistence of this conflict, notwithstanding this Court's post-Long v. Bonnes decisions, see pp.17-20, infra, is confirmed not only by the instant case but also by a just published decision from a district court in the Fourth Circuit, recognizing explicitly that the standard applied in that circuit is in conflict with that applied in other circuits. See ECOS, Inc. v. Brinegar, 671 F.Supp. 381, 390 n.3 (M.D.N.C. 1987) ("Other circuits approach this [prevailing party] problem differently than the Fourth Circuit.").

II. The Decision Below Conflicts With The Intent Of The Attorney's Fees Act And With Post-Long v. Bonnes Holdings Of This Court.

The decision below is inconsistent with both congressional intent and the reasoning of decisions of this Court. The purpose of the Attorney's Fees Act is to enable private citizens "to assert their civil rights, and . . . have the opportunity to recover what it costs them to vindicate these rights in court." S.Rep. No. 94-1011 (1976), U.S. Code Cong. & Admin. News 1976, pp. 5908, 5910.10/

10/ See also City of Riverside v. Rivera, __ U.S. __, 106 S.Ct. 2686, 2895 (1986) ("Congress enacted §1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process.") (emphasis added), citing H.Rep. No. 94-1558, p.3 (1976). That Congress presupposed such a fee recovery is contingent upon a plaintiff's success on and vindication of his or her civil rights is reflected further in its concern that losing plaintiffs would have to pay their opponent's counsel fees. S.Rep. No. 94-1011 (1976), U.S. Code Cong. & Admin. News at 5912 ("Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes.").

Further, since denying review in Long v. Bonnes, this Court has recognized that "requiring a defendant, completely successful on all issues, to pay the unsuccessful plaintiffs' legal fees would be a radical departure from long-standing fee-shifting principles adhered to in a wide range of contexts." Ruckelshaus v. Sierra Club, 463 U.S. 680, 683 (1983). See also Hewitt v. Helms, __ U.S. __, 107 S.Ct. 2672 (1987) (a party who litigates to judgment and loses on all claims is not a "prevailing party"); Kentucky v. Graham, 473 U.S. 159 (1985) (fee liability runs with merits liability).11/ Thus, by compensating plaintiffs' counsel even though plaintiffs

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11/ Not surprisingly, the "typical formulation" expressed in Hensley v. Eckerhart, 461 U.S. 424 (1983), concerning a party's eligibility for attorney's fees under 42 U.S.C. §1988, recognizes "that 'plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" 461 U.S. at 433 (emphasis added), quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978).

vindicated no federal rights, the Fourth Circuit disregarded manifest congressional intent and this Court's post-Long v. Bonnes decisions.

Last Term's decision in Hewitt v. Helms is illustrative of the conflict between the decision below and the reasoning of this Court's recent attorneys' fees decisions. Because the losing plaintiff in Hewitt obtained, at most, "an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim," 107 S.Ct. at 2675, he was not a prevailing party as "[t]hat is not the stuff of which legal victories are made." Id.

In Reigh I, the Fourth Circuit rejected plaintiffs' federal constitutional claims, reversed the district court on the merits, and upheld Maryland's post-judgment attachment procedures. That, too, "is not the stuff

of which legal victories are made."[12/] Because the court below rejected plaintiffs' claim that the State violated federal law and yet awarded plaintiffs attorneys' fees, the Fourth Circuit "decided a federal question in a way in conflict with applicable decisions of this Court." Sup.Ct.R.17.1 (c).[13/]

12/ In the court below, the plaintiffs cross-appealed on several issues, maintaining, inter alia, that they were prevailing parties because their lawsuit caused a change in the Maryland rules, which they contended were still unconstitutional. However, the district court specifically found "that plaintiffs' efforts in this litigation did not cause the changes between the Old Rules and New Rules," (App. at 29a), and this finding was not disturbed on appeal. See 829 F.2d at 1336 (App. at 4a). Furthermore, even if plaintiffs could establish the required causal connection between their lawsuit and the revision of the Maryland rules, that would not entitle them to attorneys' fees because by the time they filed their non-class action suit -- and well before the time the rules were amended -- they regained full use of their bank accounts, and so were no longer subject to Maryland's attachment procedures. See Reigh I, 784 F.2d at 1199-1200 (Widener, J., dissenting) (App. at 70a-73a). Thus, the amended rules afforded plaintiffs absolutely no redress. Accord Hewitt v. Helms, ___ U.S. at ___, 107 S.Ct. at 2677.

13/ The Fourth Circuit affirmed the district court's award of attorneys' fees, finding that the trial court's "factual findings are not clearly erroneous." 829 F.2d at 1336 (App. at 4a). That approach begs the

III. The Eleventh Amendment Bars The Award Of Attorneys' Fees Against The State Absent A Violation Of Federal Law.

The district court, whose attorneys' fee award was affirmed on appeal, found that plaintiffs were prevailing parties solely because "[a] final change, that the notice to the debtor contain a provision notifying the debtor of his right to a hearing, was recommended in this court's [subsequently reversed] decision and appears from the record to be a permanent change . . . ." (App. at 29a-30a) (emphasis added).

Thus, the notice was provided in response to the district court's "decision",

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legal question of whether plaintiffs prevailed as a matter of law and vindicated any federal rights. "[I]f the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." Inwood Laboratories v. Ives Laboratories, 456 U.S. 844, 855 n.15 (1982). In Reigh I, the Fourth Circuit held that plaintiffs did not prevail. Thus, in Reigh II, the Fourth Circuit should not have deferred to the district court's factual findings as they were based "upon a mistaken impression of applicable legal principles."

a decision which unquestionably was reversed by the Fourth Circuit. Therefore, the "recommended notice" is neither required by the United States Constitution, nor by any other federal law, and thus can be changed or deleted by the State at any time.[14/] Despite the absence of any legal requirement for this notice (and the absence of any other allegedly obtained relief), and plaintiffs' undisputed loss on the merits, the Fourth Circuit held that plaintiffs were entitled to attorneys' fees. The Eleventh Amendment prohibits this result.

"The Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest.'"

14/ Thus, whatever the merit of the district court's and the Fourth Circuit's fact-based "catalyst theory" in another case when the plaintiff obtains a permanent and substantial change in state law or policy, even if that change is not required by federal law, this theory is certainly inappropriate in this case when the change is so minor and it can be undone at any time.

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 101 (1984) (citations omitted). Plainly, this case against state court clerks in their official capacities is against the State. See Hutto v. Finney, 437 U.S. 678, 700 (1978) ("suits brought against individual officers for injunctive relief are for all practical purposes suits against the State itself").15/

Congress has the power to override the State's immunity, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), and it did so when it enacted the Attorney's Fees Act, 42 U.S.C. §1988, see Hutto v. Finney, which provides for the allowance of reasonable attorneys' fees as part of the costs "[i]n any action or proceeding to enforce a provision of . . .

15/ Plaintiffs sued three state officials in their official capacities as clerks of the Maryland District Court. (Plaintiffs' Complaint at 1 and ¶¶8-10.)

[42 U.S.C. §] 1983."[16/] However, the Act overrides the State's immunity if but only if the action or proceeding is one in which the plaintiff secures rights within the meaning of §1983, and thus is a §1983 prevailing party.

In Reigh I, the Fourth Circuit held that the State did not violate federal law. Thus, plaintiffs did not secure any right within the meaning of §1983; therefore, as a matter of law, they cannot be §1983 prevailing parties, see, e.g., Kentucky v. Graham, 473 U.S. 159 (1985), on whose behalf a federal court is authorized to enter a monetary judgment against the State.

16/ "Under §5 [of the Fourteenth Amendment] Congress may pass any legislation that is appropriate to enforce the guarantees of the Fourteenth Amendment. A statute awarding attorney's fees to a person who prevails on a Fourteenth Amendment claims falls within the category of 'appropriate' legislation." Maher v. Gagne, 448 U.S. 121, 132 (1980).

The Attorney's Fees Act was not intended to override the State's immunity in this case because plaintiffs did not secure any federal rights.[17/] Therefore, the Eleventh Amendment bars the Fourth Circuit's award of attorneys' fees.

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit. Following review, that judgment should be reversed.

17/ Nor was a fee-shifting statute such as §1988 ever intended to override the State's immunity by departing, in the absence of a plaintiff's success on the merits or securing of some right, from the American Rule "that each party is to bear the expense of his own attorney." Hanrahan v. Hampton, 446 U.S. 754, 758 (1980). "[V]irtually every one of the more than 150 existing federal fee-shifting provisions predicates awards on some success by the claimant." Ruckelshaus v. Sierra Club, 463 U.S. at 684 (emphasis in original). Here, because plaintiffs had no success in establishing that the State violated federal law, no basis exists to abrogate the State's immunity.

Respectfully submitted,

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December 30, 1987

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174/87

TABLE OF CONTENTS

IN THE UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

ESTHER V. REIGH, et al. :

v. : Nos. 87-1007(L)
87-1026

CHARLES L. SCHLEIGH, et al. :

Before WINTER, Chief Judge, and RUSSELL and WIDENER, Circuit Judges

Decided October 2, 1986 (829 F.2d 1334)

PER CURIAM:

Although defendants prevailed in the judicial aspects of plaintiffs' claim that Maryland's attachment procedures were unconstitutional because they did not afford procedural due process to a debtor and did not provide a sufficiently prompt hearing, Reigh v. Schleigh, 784 F.2d 1191 (4th Cir.) (reversing Reigh v. Schleigh, 595 F.Supp. 1535 (D.Md.1984), cert. denied, ___ U.S. ___, 107 S.Ct. 167, 93 L.Ed.2d 105 (1986), the result stemmed from Maryland's amendment of its rules while the litigation was pending. The district court found, however, that to a

limited extent, plaintiffs were "prevailing parties" because their lawsuit caused Maryland to correct the constitutional deficiencies in its attachment procedures and they were therefore entitled to an award of counsel fees under 42 U.S.C. §1988. The district court awarded $2,409.20. Plaintiffs had requested $12,000.

Both parties appeal. Plaintiffs contend that the final order terminating the litigation entered by the district court on remand from us is deficient because it contains no findings as to disputed issues and it fails to enter judgment for plaintiffs on the issues on which they prevailed. The significance of the contention lies in its effect on the extent to which plaintiffs prevailed. Maryland does not contest the reasonableness of the attorney's fees that were awarded, but it contends that plaintiffs were not prevailing parties to any extent so that no award

should have been made.

We affirm in both appeals.

We think that the final judgment entered by the district court was entirely consonant with our decision. We also think that plaintiffs did not gain victories, not reversed on appeal, that should have been included in the final order.

The fact, however, that plaintiffs did not obtain a favorable final judgment does not foreclose all of their claim to attorney's fees. See Smith v. Univ. of North Carolina, 632 F.2d 316, 346 (4 Cir. 1980). Smith recognizes that an award may be made even if plaintiff does not obtain a favorable judgment if it is found that plaintiff's actions caused defendant to remedy his errant ways. The recent decision in Hewitt v. Helms, _____ U.S. _____, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987), does not displace Smith; it confirms it. In Hewitt, the Court said:

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under §1988. A lawsuit somethimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment -- e.g., a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

___ U.S. ___, 107 S.Ct. at 2676.

Here the district court found that plaintiffs' suit "did achieve a limited change in the notice actually given to judgment debtors in postjudgment garnishments" and to that extent plaintiffs were "prevailing parties." The district court also found that only 20% of the attorneys' time was expended in accomplishing that limited change.

Our review of the record satisfies us that these factual findings are not clearly erroneous and that the judgment is correct.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ESTHER V. REIGH, et al. :

v. : CIVIL ACTION NO. M-83-245

CHARLES L. SCHLEIGH, et al. :

MEMORANDUM AND ORDER

On October 31, 1984, this court granted the plaintiffs' motion for summary judgment (Paper No. 31). Plaintiffs then moved for attorneys' fees (Paper No. 33). Defendants filed a notice of appeal (Paper No. 34). Defendants submitted an opposition to an immediate award of attorneys' fees (Paper No. 36). Plaintiffs replied (Paper No. 37).

On April 11, 1986, the United States Court of Appeals for the Fourth Circuit vacated this court's judgment and remanded the case to this court for "the entry of an appropriate order. . ." ccnsistent with the

Fourth Circuit's opinion. Reigh v. Schleigh, 784 F.2d 1191, 1199 (4th Cir. 1986) (Paper No. 28 of this action). Defendants then filed a motion for entry of final judgment (Paper No. 39). Plaintiffs opposed and cross-moved for final judgment (Paper No. 41). Defendants responded (Paper No. 40). Plaintiffs then supplemented their motion for attorneys' fees to include a request for fees for hours spent on the appeal (Paper No. 42). Defendants submitted an opposition (Paper No. 43). Julia M. Freit submitted an affidavit concerning the proposed changes to the Maryland District Rules (Paper No. 44). Plaintiffs' Petition for Writ of Certiorari was denied by the United States Supreme Court (Paper No. 45). Plaintiffs then filed a response to defendants' opposition (Paper No. 46) and a supplement to their response to defendants' motion for entry of final judgment (Paper No. 47). No hearing is

needed to decide this matter. Local Rule 6(G).

I. Factual Background

On July 24, 1983, the plaintiffs instituted this action to challenge the constitutionality of several of the rules applicable to post-judgment garnishment proceedings in Maryland District Courts (Paper No. 2). Some of the challenged rules were changed while this suit was pending. The somewhat confusing recent history of the challenged rules, as they existed at the time the suit was filed, as amended on October 21, 1983 and as amended effective July 1, 1984, was recounted in this court's Memorandum and Order in Reigh v. Schleigh, 595 F. Supp. 1535 (D. Md. 1984) as follows:

> "Under the challenged Maryland District Court garnishment rules in existence at the time this suit was instituted, in order for a writ of attachment by way of garnishment to issue the judgment creditor filed instructions to the sheriff as to the description and location of the debtor's property to be

attached. M.D.R. F1, G42d. The writ was then served on the garnishee, the person having property or credits belonging to the defendant. M.D.R. F1, G47a. The writ of attachment was required to notify each person upon whom it was served, i.e., the garnishee(s), to file in writing a defense, G52, within thirty days after service of the writ. If a claim of total exemption was filed by the garnishee, the creditor, within thirty days, must have either dismissed or requested a hearing. If a hearing was requested, the matter was set for trial. M.D.R. F2. If some other initial pleading by the garnishee or the debtor was filed, the case was also set for trial. M.D.R. F2b.

Alternatively, the judgment debtor could obtain the dissolution of the writ by giving a bond in an amount equal to the attached property. M.D.R. F1, G57.

A final alternative under the former rules was for the garnishee or the debtor to file a motion to quash the writ. Such a motion must have been filed within thirty days of the service of the writ on the garnishee. M.D.R. G51a. The court then, upon notice to the creditor, was required to hear the motion to quash 'forthwith.' M.D.R. F1, G51(b). The writ of attachment by way of garnishment remained in effect until it was quashed. M.D.R. F1, G51c.

If no defense was filed within the thirty-day period after service of the writ, the judgment creditor could prove the amount of the debtor's assets in the hands of the garnishee, and a Judgment of Condemnation Absolute would thereupon be

entered against the garnishee. M.D.R. F3. If the garnishee filed a Confession of Assets, the court could enter a Judgment of Condemnation Absolute. M.D.R. F4. Execution of Judgments of Condemnation Absolute could be awarded by the court at any time. M.D.R. F5.

At the December 2, 1983 hearing, this court observed that on October 21, 1983, the Maryland Court of Appeals had ordered the adoption of amendments to the Maryland District Rules, Chapter 1100, Subtitle G and Subtitle F. These changes were subsequently printed in the Maryland Register. Md.Admin.Reg. Vol. 10, Issue 23 (Nov. 11, 1983). The majority of these changes dealt with amendments to the G Rules, the statutory procedures governing attachment before judgment. Because, however, the post judgment garnishment procedures contained in Subtitle F incorporate by reference some of the G Rule procedures, Rule F1 was amended to incorporate the changes in the G Rule references. The only substantive change, as of October 21, 1983, in the post judgment garnishment procedures which are challenged in this suit is the change in Rule G51. The former Rule G51, providing the procedure for filing a motion to quash the writ, was deleted to accommodate the adoption of a new Rule G51, a comprehensive rule covering release of property and dissolution of attachment. The specific change in the procedures challenged by the plaintiffs and contained in the new Rule G51, as of October 21, 1983, was that now a hearing on a motion to release property or to dissolve the attachment pursuant to Rule G51 must be required by a party, and once reques-

ted, the hearing shall be held 'promptly,' rather than 'forthwith,' as required by the former Rule G51(b). The remaining procedures or lack thereof challenged by the plaintiffs remained unchanged in the October 21, 1983 change in the rules.

IV. Latest Changes in the Maryland District Rules

In their motions before this court, the defendants asserted that the changes in the Maryland District Rules that the plaintiffs sought were then currently under consideration and were expected to be put into effect in the next several months after the December, 1983 hearing. The defendants referred to the Tentative Draft of the Revised Maryland Rules of Procedure, published in November, 1982, by the Rules Committee of the Judiciary of Maryland. (Preface, Tentative Draft).

As the plaintiffs accurately pointed out, the proposed rules contained in the Tentative Draft revised only the procedures of the Circuit Courts of Maryland and did not affect or attempt to alter the District Rules which contain the procedures challenged in the present case.

At the December 2, 1983 hearing, however, the defendants submitted to the court a copy of the proposed Eighty-Eighth Report of the Standing Committee on Rules of Practice & Procedure. In that report, which was later submitted to the Court of Appeals on December 9, 1983, the Rules Committee proposed amendments to the Maryland District Rules. (Defendants' Exhibit No. 4). Md.Admin.Reg.

Vol. 10, Issue 25 (Dec. 9, 1983). Three specific proposed rules were called to the court's attention, 3-311, 3-643, and 3-645.

These proposed changes to the Maryland District Rules were later adopted by the Maryland Court of Appeals on April 6, 1984, effective July 1, 1984. Md.Admin. Reg. Vol. 11, Issue 9 (Apr. 27, 1984).

The new Maryland District Rules provide that the judgment debtor will be mailed a copy of the writ at his last known address by the party serving that writ on the garnishee. The writ shall contain notice to the judgment debtor that federal and state exemptions may be available, and of his right to contest the garnishment by filing a motion asserting a defense or objection. M.D.R. 3-645. A motion for exemption filed by the judgment debtor must be filed within thirty days of service of the writ. M.D.R. 3-643. Finally, the new rules provide that a party desiring a hearing on a filed motion must file a timely request within five days of service of the motion. M.D.R. 3-311(d)."

(Id. at 1542-48) (footnotes omitted).[1/]

1/ The three versions of the Rules will be referred to in this Memorandum and Order as follows: 1) the rules in effect at the time this suit was filed ("the Old Rules"); 2) the rules as amended October 21, 1983 ("the Old Rules as amended"); and 3) the rules amended effective July 1, 1984 (the New Rules").

This court found that the Old Rules, as amended, did not satisfy the requirements of due process, because there was no guarantee that the judgment debtor would receive notice of a garnishment sufficient to allow him to obtain a meaningful judicial determination of his right to an exemption. Id. at 1554. This court concluded, however, that New Rule 3-645(d), while somewhat ambiguous, appeared to provide for the timing of notice to the judgment debtor in a manner sufficient to satisfy the requirements of fairness inherent in the Due Process Clause. Id.

This court next found that the content of the notice was insufficient in that it did not advise the debtor of the procedure for protesting the garnishment or the grounds on which the garnishment could be challenged. Id. at 1555-56. This court finally found that the Old and New Rules, which did not provide for a particular period of time with-

in which a motion asserting an exemption must be heard, were too easily abused and provided the opportunity for constitutional deprivation. Id. at 1556-57. This court concluded that, if a hearing is requested, it must take place within two weeks of the request, and, if no hearing is requested, the claim of exemption must be resolved within two weeks of the date of its filing. Id. at 1557.

There is evidence in the record that comments from the Legal Aid Bureau to the Maryland Court of Appeals Standing Committee on Rules of Practice and Procedure ("the Rules Committee") may have been influential in bringing about some of the rule changes that occurred during the pendency of this suit (see Paper No. 43, Jan. 25, 1984 letter of John F. McAuliffe and attachment thereto; Paper No. 48, Exh. F at 28, 30-33; Paper No. 48, Exh. E at 2).

On May 21 and 22, 1982, before this suit was filed, the Rules Committee partially accepted the recommendation of the Legal Aid Bureau that the garnishment procedure provide for notice to the debtor and that such notice advise the debtor of the availability of exemptions (Paper No. 48, Exh. F at 30-33). The Committee, at one of its May, 1982 work sessions, agreed to change section (c) of Rule 2-668 to read as follows:

> "After the garnishee is served, the individual making service shall promptly mail a copy of the writ to the debtor's last known address and shall file proof of service and mailing in the manner provided by Rule 2-126."

(Id., Exh. F at 33).

After this court issued the October 29, 1984 Memorandum and Order, the Rules Committee met on November 16 and 17, 1984 to consider what, if any, changes to the District Rules were mandated by this court's decision (Paper No. 48, Exh. J). During those meetings, it was suggested by a Committee member

that the time limit for a hearing date be permanently changed to 14 days, consistent with this court's Memorandum and Order (id., Exh. J at 16). This suggestion was rejected (id., Exh. J at 17). Instead, the Committee approved the passing of an administrative order requiring that the hearing be held in 14 days. This measure was adopted, on a temporary basis, to keep the system operating while an appeal was pending (id.). The word "promptly" was left in the rule (id.). The members also discussed this court's suggestion that a list of exemptions be included in the notice, but rejected that suggestion as a permanent change in the Rules (id., Exh. J at 9-10).

The Committee decided to approve the passage of an administrative court order to require the garnishment writ to contain a notice of a right to demand a hearing on a garnishment (id., Exh. J at 13). That deci-

sion was in accord with this court's ruling that the notice did not comport with due process when it did not advise the debtor of, inter alia, the procedure for protesting the attachment of his bank account.

This court subsequently on November 27, 1984 issued a judgment order and injunction which included a form of notice which the court found acceptable under due process standards (Paper No. 32).

On appeal, the Fourth Circuit vacated this court's decision and remanded the case for the entry of an order in conformity with the Fourth Circuit decision. Reigh v. Schleigh, 784 F.2d 1191, 1199 (4th Cir. 1986).

The Fourth Circuit held that the laundry list of exemptions suggested by this court was unnecessary. Id. at 1197. The court noted that the provision of New Rule 3-645(c)(4) providing that the writ of attach-

ment served on the debtor "notify the judgment debtor that federal and state exemptions may be available," was sufficient. Id. at 1197 n.4.

The Fourth Circuit also held that there was no evidence of undue delay in these cases, and absent evidence of undue delay, the mere possibility that the term "promptly" was "too easily abused" in practice or fraught with "the opportunity for constitutional violation" was insufficient to impose such an inflexible procedural rule as the 14-day rule on the administration of the state courts. Id.

The Fourth Circuit did not discuss this court's requirement that there be notice given of a right to a hearing. While the judgment of this court was vacated, no indication was contained in the Fourth Circuit's opinion that this court was in error in that regard.

II. Prevailing Party

A. The Legal Standard

The Fourth Circuit rule for deciding whether a party is a "prevailing party" for the purposes of 42 U.S.C. § 1988 was set forth in Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979). Under Bonnes, the initial step is to determine "the precise factual/legal condition the fee claimant has sought to change or affect so as to gain a benefit or be relieved of a burden." Id. at 1319. Once this "benchmark" condition is established, the court must then determine whether "the outcome, in whatever form it is realized, is one to which the plaintiff fee claimant's efforts contributed in a significant way, ..." Id. A party may be deemed to have "prevailed" even though it has not won all of the relief it requested. Disabled in Action v. Mayor & City Council of Baltimore, 685 F.2d 881, 886 (4th Cir. 1982); Bonnes, 599

F.2d at 1318. Where a case is mooted because of administrative, legislative or private action towards which it may be reasonably determined that the lawsuit has contributed in a significant way, the plaintiff is a prevailing party. Disabled in Action, 685 F.2d at 885; Young v. Kenley, 641 F.2d 192, 195 (4th Cir. 1981).

If, however, the substantive relief sought by the plaintiff is obtained by legislative or other action which is not shown to have resulted from the judicial proceeding, the plaintiffs are not entitled to attorneys' fees. Bly v. McLeod, 605 F.2d 134, 138-39 (4th Cir. 1979).

In Young v. Kenley, Judge Butzner explained the causation requirement and how it required different results in Young and Bly. 641 F.2d at 195. In Young, the plaintiff Willie E. Young was a black woman who had been hired as a nurse by the Central Vir-

ginia Health District. Id. at 193. Young was hired at a lower pay level (level "A") than recommended, because her nursing school had not been accredited by the National League of Nursing. Id. Young filed a complaint with the EEOC, after which the employer notified Young that she was qualified for level "B," a slightly higher pay level. Id. at 194. Young then filed several claims in the federal district court. Before her trial was completed, the parties reached a settlement agreement, which provided for, inter alia, a raise to the highest pay level, level "C." Id. In reversing a denial of attorneys' fees, Judge Butzner wrote:

> "This case is readily distinguishable from Bly v. McLeod, 605 F.2d 134 (4th Cir. 1979). In that case a statutory amendment to South Carolina's absentee ballot provision mooted plaintiffs' case. This court found that plaintiffs were not prevailing parties and denied attorneys' fees. We observed, 'In order to recover attorneys' fees and costs, plaintiffs must show at least some success on the merits.' 605 F.2d at 137. The substantive relief in Bly was

> obtained by legislative enactment which was not shown to have resulted from the judicial proceeding. Here, in contrast, settlement in the midst of trial demonstrates the lawsuit and the benefits obtained are causally related.
>
> Moreover, Young has clearly demonstrated success on the merits."

Id. at 195.

This court, therefore, concludes that in order for the plaintiffs to receive reasonable attorneys' fees in a case where the ultimate disposition of the case, by appeal or otherwise, is unfavorable to the plaintiffs, the burden is on the plaintiffs to prove some causal connection between the plaintiffs' efforts in the litigation itself and the change in condition.

The Supreme Court has held that attorneys' fees may be recovered for time spent pursuing extra-judicial administrative proceedings if the work is "useful and of the type ordinarily necessary to secure the final result obtained from the litigation." Penn-

sylvania v. Delaware Valley Citizens' Council for Clean Air, 106 S.Ct. 3088, 3096 (1986) (quoting Webb v. Board of Education of Dyer County, 105 S.Ct. 1923, 1929 (1985)).

B. Discussion

In deciding whether the plaintiffs are prevailing parties, the court has considered the precise factual/legal conditions sought to be changed, determined to what extent, if any, those conditions were changed and determined to what extent, if any, the plaintiffs' actions in this lawsuit caused such changes to occur.

1. The Benchmark

The conditions existing at the time this suit was filed and sought to be changed were:

1) The Old Rules contained no requirement that the judgment debtor be given notice of anything. See 595 F. Supp. at 1554.

2) Under the Old Rules, if the debtor or garnishee filed a motion to quash the writ,

the court, upon notice to the creditor, was required to hear the motion "forthwith." Id. at 1543.

The plaintiffs sought to change those conditions as follows:

1) Require that a timely notice be served upon the judgment debtor prior to, or immediately subsequently to, the service of the Order of Attachment upon the garnishee.

2) Require that such notice state the available state and federal exemptions and describe the procedure whereby the judgment debtor could challenge the attachment.

3) Require a prompt hearing, when requested by the judgment debtor, to contest an attachment.

The Rules as they exist today are as follows:

1) A copy of the writ must be mailed to the judgment debtor at his last known address by the party serving the writ.

2) The writ shall contain notice to the judgment debtor that federal and state exemptions may be available and that the debtor has a right to contest the garnishment by filing a motion asserting a defense or objection.

3) If a hearing is requested, a hearing must be held "promptly."

In addition, the form of notice, now required by administrative court order, contains a notice to the judgment debtor that the debtor may request a hearing on a motion claiming an exemption of property from garnishment.

Some of the changes sought by the plaintiffs have in fact occurred. The next inquiry, therefore, is whether as a practical matter, the plaintiffs' efforts in this lawsuit contributed in a material way to those changes. Most of the changes in the rules occurred while this suit was pending before

this court although in part they were under consideration before this suit was filed. There is evidence that the extrajudicial efforts of the Legal Aid Bureau, plaintiffs' attorneys, may have contributed to some of those changes (Paper No. 43, Letter of John F. McAuliffe dated January 25, 1984; Paper No. 48, Exh. E at 2; Paper No. 48, Exh. F. at 28, 30-33).

The efforts of the Legal Aid Bureau before the Rules Committee are not the type of efforts compensable under § 1988. Plaintiffs argue that these efforts fall into the category of administrative efforts "useful and of the type ordinarily necessary" to secure the final result obtained from the litigation, Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 106 S.C. 3088, 3096 (1986) (quoting Webb v. Board of Education of Dyer County, 105 S.Ct. 1923, 1929 (1985).

A brief analysis of the Webb and Delaware Valley cases shows that the Legal Aid Bureau's extrajudicial efforts are not of the type for which credit may be given.

In Webb, the Court held that fees were not recoverable for attorneys' services during school board hearings at which Mr. Webb challenged the termination of his employment as a school teacher. Id. at 1925. Webb then filed a 1983 suit, which was settled. Both parties agreed that Webb was the "prevailing party" in the 1983 suit. Id. at 1926. Webb sought attorneys' fees for the services of his counsel at the administrative hearings in front of the school board on the basis that those hearings constituted proceedings to enforce a provision of §1983, within the meaning of §1988. Id. Webb alternatively argued that the time was reasonably expended in preparation for the litigation.

The Court rejected both of these arguments, distinguishing Webb's situation from that involved in New York Gas Lioht Club, Inc. v. Carey, 447 U.S. 54 (1980). In Carey, the Court held fees recoverable for attorney services pursuing state administrative remedies required by Title VII. Section 1983 does not require the exhaustion of remedies. The administrative proceedings pursued in Webb were independent from the suit, the Court held.

In Pennsylvania v. Delaware Valley Citizens' Council, 106 S.Ct. 3088 (1986), the Supreme Court allowed attorneys' fees for extrajudicial administrative work to enforce the provisions of a consent decree. Id. at 3094-96. Plaintiffs argue that the various letters to the Maryland Rules Committee were necessary to effect a rule change because the suit was brought against court clerks, who do not have the power to change the rules. This

argument appears to undermine plaintiffs' claim that the suit was the impetus for the rule changes. On one hand, the plaintiffs argue that they should be deemed to have prevailed in the litigation because the litigation caused the rule changes. On the other hand, they argue that the litigation alone could not have caused the rule changes. The injunction issued by this court caused at least some change and would have caused more had it not been vacated.

The plaintiffs' efforts before the Rules Committee were neither required by statute, as in Carey, nor required to enforce any decree or order of this court, as in Delaware Valley. Because those efforts are not considered a part of the litigation for the purposes of fees, those efforts cannot be considered a part of the litigation for the purpose of determining if the litigation caused the rule changes. This court, therefore,

finds that the plaintiffs' efforts in this litigation did not cause the changes between the Old Rules and the New Rules.

The Rules Committee did meet, however, on November 16 and 17, 1984 and approved some changes in administrative court orders to supplement the New Rules in response to the decision in this case.

One change, the change relating to the wording of the notice describing state and federal exemptions which may be available, was not the change sought nor was it the change recommended by this court. Another change, the administrative order temporarily declaring that "promptly" means 14 days, was merely temporary, and was in fact rendered moot by the Fourth Circuit decision. A final change, that the notice to the debtor contain a provision notifying the debtor of his right to a hearing, was recommended in this court's decision and appears from the record to be a

permanent change in the implementing administrative state court order.

It appears from the record, therefore, that this lawsuit actually caused no change in the Rules, but did achieve a limited change in the notice actually given to judgment debtors in postjudgment garnishments. Plaintiffs, therefore, are "prevailing parties" to a very limited extent.

Plaintiffs also claim that they are prevailing parties because they succeeded in having the Old Rules declared unconstitutional (Paper No. 45 at 18-19). This issue was mooted by the changes in the rules which occurred during the pendency of this suit. Since the changes in the Old Rules were not brought about by the impetus of this suit, plaintiffs cannot be prevailing parties as to matters relating to the Old Rules.

Having determined that the plaintiffs were prevailing parties to a limited extent

in connection with official court procedures under the New Rules, however, the court believes that an award of some fees is appropriate.

III. Calculating Attorneys' Fees

Once it has been determined that attorneys' fees are warranted, the court must decide what amount would be "reasonable." Hensley v. Eckerhart, 461 U.S. 424, 433 (1982). The first step in determining what amount is reasonable is to determine the number of hours reasonably spent on the litigation and multiply that by a reasonable hourly rate. Id.; see also Blum v. Stenson. 465 U.S. 886, 897 (1984). The product of this process is referred to as the "lodestar" or guiding figure. See e.g., Vaughn v. Board of Education of Prince George's County, 770 F.2d 1244, 1246 (4th Cir. 1985).

Once the lodestar figure is obtained, that figure may be adjusted upward or down-

ward depending on several factors, including the "results obtained." Hensley, 461 U.S. at 434; Barber v. Kimbrell's, Inc., 577 F.2d 216, 226 n.28 (4th Cir.), cert. denied, 439 U.S. 934 (1978). When a plaintiff has prevailed on only some issues, the degree to which the plaintiff prevailed is particularly important. Hensley, 461 U.S. at 434.

> "If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained....
>
> There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified...."

461 U.S. at 434-37 (citations and footnotes omitted).

A. The Lodestar

Two attorneys, Elizabeth Renuart and Mark J. Davis, who are or were associated with Legal Aid, represented the plaintiffs in this case. Between them, they seek compensation for 130.20 hours work.[2/] Defendants have not argued that any of the time spent on the trial and post-appeal work is unreasonable.[3/] Defendants also have not challenged the hourly rate of $95.00 per hour sought by the plaintiffs.

As stated supra, the plaintiffs are not entitled to fees for the time that their

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2/ Plaintiffs had submitted a request for fees for time spent by Elizabeth Renuart on the appeal of this case to the Fourth Circuit (Paper No. 42). Plaintiffs have since withdrawn that request (Paper No. 45 at 20).

3/ Defendants objected to the award of attorneys' fees for the appeal (Paper No. 43 at 15). That objection is now moot. (See note 2 supra).

attorneys spent contacting the Maryland Rules Committee. Upon review of the time reports submitted, it appears that the time spent by Elizabeth Renuart on 4/82, 5/7/82, 5/11/82, and 6/21/82 was all spent in contacting or attempting to influence the Rules Committee. That time when aggregated comes to 3.25 hours. These hours will not be considered as part of the lodestar.

The remaining hours listed in Elizabeth Renuart's initial affidavit add up to 71.35 hours. The hours listed in Mark J. Davis' affidavit add up to 21.5 hours.[4/] The additional hours listed in Elizabeth Renuart's affidavit attached to Plaintiffs' Response to Defendants' Opposition to Motion for Award of Attorneys' Fees add up to 33.95

4/ The Renuart time (71.35 + 3.25 = 74.6) is .4 hours short of the 75 hours claimed by Renuart. This is apparently an addition error. The Davis time (21.5 hours) is .25 hours more than that claimed by Davis. This is also apparently an addition error.

hours (Paper No. 45, Exh. B.). Total hours allowable to compute the lodestar are 126.8.

In plaintiffs' Motion for Award of Attorneys' Fees (Paper No. 33), plaintiffs state that the rate requested, $95.00 per hour, is slightly lower than the prevailing market rate charged by attorneys with five years' experience (id. at 5). In Renuart's latest affidavit, plaintiffs request a fee of $105.00 per hour. Because there is no explicit explanation of why plaintiffs are now seeking a higher rate than the initial rate of $95.00 per hour, the court will compute the lodestar based on the lower rate.

The lodestar figure is 126.8 hours times $95.00 per hour, or $12,046.00.

B. Adjustment to the Lodestar

As stated above, the plaintiffs prevailed only to a very limited extent. Although some of the rule changes sought by the plaintiffs were in fact brought about by

extrajudicial efforts of the plaintiffs' counsel, the court has found that those changes were not caused by this litigation. Plaintiffs' degree of success, therefore, is limited to the change to the notice form approved by the Rules Committee in response to this suit. Those changes were as follows: 1) the notice of state and federal exemptions was changed, but not in the way requested by the plaintiffs; 2) the notice form was changed to include a provision notifying the debtor of his right to a hearing; 3) the "promptly" hearing time requirement was temporarily changed by administrative order to 14 days, which latter change was mooted by the Fourth Circuit's opinion.

In view of this limited degree of success as compared to what the plaintiffs were seeking in the lawsuit, this court will reduce the lodestar figure by 80%. Plaintiffs will be awarded attorneys' fees of

$2,409.20.

IV. Motion for Entry of Final Judgment

Defendants have moved for entry of final judgment (Paper No. 39). Plaintiffs have responded (Paper No. 41), and defendants have replied (Paper No. 46). The Fourth Circuit in Reigh v. Schleigh noted that before entry of final judgment, this court should inquire as to whether the form of writ in use by the Maryland District Court system conforms to the Rule requiring that the judgment debtor and the garnishees be informed in writs of garnishment that federal and state exemptions may be available. 784 F.2d at 1191 n.4.

The defendants are ordered to produce a copy of the form of writ now in use in the District Court system. Entry of final judgment will be deferred until that writ is reviewed by this court.

Accordingly, it is this 28th day of November, 1986, by the United States District

Court for the District of Maryland, ORDERED:

1. That the defendants shall pay the plaintiffs $2,409.20 in attorneys' fees to be assigned as follows:

Renuart	$2,000.70
Davis	408.50
	$2,409.20

2. That within fifteen (15) days of this Memorandum and Order, defendants submit a copy of the writ of attachment notice now used in the Maryland District Courts.

3. That final judgment be deferred until this court has had an opportunity to review that notice.

4. That the Clerk mail a copy of this Memorandum and Order to counsel for the parties.

James R. Miller, Jr.
United States District
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ESTHER V. REIGH, et al. :

v. : CIVIL NO. S 83-245

CHARLES L. SCHLEIGH, et al. :

MEMORANDUM

Pursuant to Judge Miller's Memorandum and Order dated November 28, 1986 (Paper No. 49), defendants have submitted a copy of the writ of attachment notice now in use in the Maryland District Courts. After reviewing that writ, as directed by the Fourth Circuit's decision in Reigh v. Schleigh, 784 F.2d 1191, 1197 n. 4 (4th Cir. 1986), this Court concludes that the writ is in the form prescribed by Md. Rule 3-645(c)(4). Final judgment, therefore, will be entered on behalf of the defendants by separate order.

Frederic N. Smalkin
United States District
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ESTHER V. REIGH, et al. :

v. : Civil No.

: S 83-245

CHARLES L. SCHLEIGH, et al.

ORDER AND JUDGMENT

For the reasons stated in the foregoing Memorandum, IT IS, this 18th day of December, 1986, by the Court, ORDERED and ADJUDGED:

1. That final judgment BE, and the same hereby IS, ENTERED in favor of the defendant, against the plaintiffs, on all counts;

2. That this case BE, and the same hereby IS, DISMISSED, with prejudice;

3. That the parties shall bear their own costs; and

4. That the Clerk of Court mail copies of the foregoing Memorandum and of this Order and Judgment to counsel for the parties.

Frederic N. Smalkin
United States District
Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ESTHER V. REIGH, et al.	:	
Appellees	:	
v.	:	NO. 85-1021
CHARLES L. SCHLEIGH, et al.	:	
Appellants.	:	

Before WINTER, Chief Judge, and RUSSELL and WIDENER, Circuit Judges.

Decided March 4, 1986 (784 F.2d 1191)

RUSSELL, Circuit Judge:

This is a suit challenging the constitutionality of Maryland's District Rules governing post-judgment attachments of property of a judgment debtor as issued by the Maryland Court of Appeals and separately codified at the time this suit was filed as the Maryland District Rules, Chapter 1, 100-700, 1100-1300. Chapter 100, Subtitles G & F contain the challenged procedures. The four plaintiffs are judgment debtors whose bank accounts had been attached in 1982 under

writs of attachment which had been issued under such rules but which had been vacated before this action was begun. They allege, and it was not disputed, that their bank accounts, which had been attached, consisted exclusively of either Social Security or Aid to Families with Dependent Children payments. In all cases, the plaintiffs filed with the Maryland court exemption claims and the claimed exemptions were sustained by the court in 1982. It was not until January 24, 1983 after the claims of exemption were upheld that the plaintiffs filed this action asserting the unconstitutionality on due process grounds of the procedures established under the Maryland Rules for the issuance of post-judgment writs of attachment.

The Maryland post-judgment attachment Rules, in force when this action was begun, made no provision for notice to the judgment debtors of their possible state or federal

exemptions. The rules did provide that, if the judgment debtor, after learning of the garnishment, moved to quash the writ within thirty days, the court was required to hear such motion "forthwith." Prior to judgment below, however, the Rules were amended by the Maryland Court of Appeals to provide (1) for notice of the attachment to be given the judgment debtor by the person serving the writ upon the judgment debtor "promptly after service upon the garnishee" and (2) for notice to the judgment debtor at the same time as notice of attachment "that federal and state exemptions may be available" to him or her. The Rules, also, gave the judgment debtor notice of the right to file a motion claiming an exemption or objecting to the garnishment within thirty (30) days and to request a hearing on such motion, which, when requested, must be held "promptly." The parties seem to have agreed that the action

should be determined on the basis of the Rules as amended and the decision of the district court from which this appeal is taken, proceeded on that basis.

After denying the defendants' motion to dismiss the action for mootness, the district court reviewed the Rules as revised and concluded that the notice of the issuance and service of the writ on the judgment debtor, as provided in the Rules, complied to that extent with the requirements of due process but that the procedure in the Rules remained defective in two respects:

> (1) They "do not provide for adequate notice to a judgment debtor of the claims of exemption which are available"; and
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> (2) They do not "assure resolution of a claim of exemption within a reasonable time," which the district court fixed as "within two weeks" from the time the claim of exemption is filed.

In order to correct these perceived defects, the district court enjoined the issuance of post-judgment writs of attachment without

conforming to a form to be approved by the court listing all exemptions and setting forth a procedure for resolving such claims for exemption by the judgment debtor within two weeks (later stated as 15 days). Reigh v. Schleigh, 595 F.Supp. 1535 (D. Md. 1984).

The defendants have appealed from the judgment entered by the district court. Their first ground on appeal is the mootness of plaintiffs' claim. Turning to the merits, they cite Endicott Johnson Corporation v. Encyclopedia Press, Inc., 266 U.S. 285 (1924) as authority for the proposition that there is no due process right on the part of a judgment debtor to notice of the issuance of a writ of attachment, of his entitlement to state or federal exemptions, or to a right to contest the writ promptly. Assuming, however, that due process guarantees these rights to the judgment debtor, the defendants argue that the amended Rules, which were the

rules on which the district court based its ruling, fully satisfied due process requirements and the contrary judgment of the district court is in error.

While there is much to be said for the mootness argument since the writs of attachment in the case of all four plaintiffs had been vacated before this action was commenced,[1/] we are of opinion that under our decision in Harris v. Bailey, 675 F.2d 614 (4th Cir. 1982), the facts of which are almost identical to those in this case, the claim of mootness by the defendants is without merit. Nor is an issue posed in this case on the duty of the defendants under due process grounds to provide notice in a post judgment proceeding of the issuance of the writ of attachment to the judgment debtor and to acquaint him of his opportunity to make a

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1/ See, the dissenting opinion of Aldisert, J., in Finberg v. Sullivan, 634 F.2d 50, 68 (3d Cir. 1980).

timely contest of the writ or of his right to a "prompt" hearing on request. The amended Rules give the judgment debtor those rights. What is challenged in these Rules and only what is challenged is whether the notice of the writ must include notice of all possible federal and state exemptions, and whether the hearing afforded the judgment debtor must be held "within two weeks" or "fifteen days" after request therefor.

Addressing the first of these two questions, we begin by recognizing that there is a conflict in the decisions on the necessity for the notice to the judgment debtor of the writ to include a list of all available federal and state exemptions that might be available to the judgment debtor. Finberg v. Sullivan, 634 F.2d 50 (3d Cir. 1980) (en banc) is generally cited as the recognized authority for the view that all available exemptions must be listed in the notice to

the judgment debtor, though the actual holding in that case did not go that far. For other cases, generally cited to this effect, see Neeley v. Century Finance Co. of Arizona, 606 F.Supp. 1453 (D.Ariz. 1985); McCahey v. L.P. Investors, 593 F.Supp. 319 (E.D.N.Y. 1984); Clay v. Fisher, 584 F.Supp. 730 (D. Ohio 1984); Dionne v. Bouley, 583 F.Supp. 307 (D.R.I. 1984), modified, 757 F.2d 1344 (1st Cir. 1985); Deary v. Guardian Loan Co., Inc., 534 F.Supp. 1178 (S.D.N.Y. 1982); Betts v. Tom, 431 F.Supp. 1369 (D. Hawaii 1977). In Finberg the bank account of the judgment debtor had been seized; the account consisted of funds "entirely exempt from attachment and garnishment," representing deposits of Social Security benefits and moneys within a general "exemption to a class of debtors which includes Mrs. Finberg." 634 F.2d at 52. Both of these exemptions were said to be "designed to protect a debtor's

means of purchasing basic necessities" and failure to recognize such exemptions could cause "serious, undue hardship" to a debtor in Mrs. Finberg's situation. The majority in that case, after declaring that "the content of the notice depends upon the circumstances of the particular case," required that the notice to Mrs. Finberg should expressly identify those two exemptions but it added this cautionary note: "Because Mrs. Finberg did not claim other exemptions under Pennsylvania law, we need not determine the effect of our decision on Pennsylvania exemptions not claimed by Mrs. Finberg." 634 F.2d at 62. Finberg, thus, is not authority for the proposition that due process requires that the notice to the judgment debtor include all possible exemptions; it only declared that, based on "the circumstances" of Mrs. Finberg's particular case, two express exemptions claimed by Mrs. Finberg should

have been noticed.[2/]

Many of the decisions which have followe d Finberg and have been cited in support of a rule that due process compels a listing of all exemptions in the notice to the debtor have generally had the same ambiguity as Finberg. Thus, in Neeley v. Century Finance Co., 606 F.Supp. at 1465, the court said categorically that "[d]ue process does not require that all exemption statutes be identified and set forth in detail" in the notice given to the judgment debtor in a

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2/ This limited construction of the ruling of the majority in Finberg was recognized by Judge Aldisert and was a part of his dissent (634 F.2d at 82):

> Although the majority are unwilling to provide notice of all exemptions available under state and federal law, there is no principled reason for excluding other exemptions of equal importance in future cases. It will therefore not be unexpected for the Community Legal Services, Inc. to bring a new case in the district court alleging deprivation of due process for a creditor's failure to notify a debtor of other exemptions.

post-judgment garnishment or attachment, but only "[t]hose exemptions that occur frequently should be included in the notice" and, in that context, the court declared it was "not deciding, other than for wages, [under the Arizona statute] what particular exemptions must be identified." To the same purport is Harris v. Bailey, 574 F.Supp. 966, 971 (W.D.Va. 1983). There the court expressly said that "notice of all available exemptions," which would represent, in the court's words, "a potentially confusing laundry list" more likely to confuse than to clarify, was not required by due process. Its rule was "that the summons served on the debtor contain a list of those essential federal and state exemptions that provide the basic necessities of life for someone in Mrs. Harris' position. The Social Security exemption certainly should be included; such benefits provide the bare necessities for

many in our society." The New York cases of Deary v. Guardian Loan Co., Inc., 534 F.Supp. 1178 (S.D.N.Y. 1982), and McCahey v. L.P. Investors, 593 F.Supp. 319 (E.D.N.Y. 1984) dealt with a state procedure which by statute required a notice to the judgment debtor, giving him what the notice said was "a partial list of money which may be exempt" [the statutory list included nine specific exemptions]. See section 5222 of the New York statutes as quoted in McCahey in note 1 on pages 321-322. Manifestly, the notice was defective if it did not comply with the mandate of the statute. However, the important fact is that the notice only included nine exemptions which the legislature found to be required included in the notice to the judgment debtor.

The contrary view has been expressed in Dionne v. Bouley, 757 F.2d 1344, 1354 (1st Cir. 1985), modifying 583 F.Supp. 307; Brown

v. Liberty Loan Corp. of Duval, 539 F.2d 1355, (5th Cir. 1976), cert. denied, 430 U.S, 949; see also Duranceau v. Wallace, 743 F.2d 709, 712-713 (9th Cir. 1984)[3/] and particularly, the carefully reasoned dissents of Judge Aldisert and Judge Weis in Finberg. 634 F.2d at 64 et seq., and 93 et seq. In his dissent, criticizing the requirement that the exemptions be listed in the notice to the judgment debtor, Judge Aldisert said (634 F.2d at 84):

> The majority have constructed a veritable Frankenstein, a complicated procedure that far exceeds the hurt it is designed to heal and will, in the end, prove counterproductive. Given the sheer numerousness of Pennsylvania exemptions and the complexity of alternative procedures to claim them, the majority's requirement in reality departs substantially from the simple notice the Supreme

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3/ The state garnishment law required notice of the exemption for 50% of the judgment debtor's wages but imposed no obligation to notice any other specific exemption. This case, though arising under the law of the State of Washington, was apparently similar to the Arizona case involved in Neeley, supra.

Court recommended in another context. See Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13-15, 98 S.Ct. 1554, 1562-1563, 56 L.Ed.2d 30 (1978). Moreover, the notice requirement has no analogue in the Federal Rules of Civil Procedure, which were promulgated by the United States Supreme Court. The brute fact is that there are so many exemptions that to set forth this information on a writ would present a mass of incomprehensible boilerplate reeking with legalese.

Judge Weis, in his dissent on the same subject, declared (634 F.2d at 93):

> I also share Judge Aldisert's misgivings about the desirability and effectiveness of the notice required by the majority. There are simply too many variations and nuances in the Pennsylvania exemption laws to permit the preparation of a brief yet comprehensive, and simple yet precise, explanation that will be of assistance to the average debtor. The fragmented approach taken by the majority in this case inevitably will lead to further litigation and the same overkill that has characterized the excrescent disclosure requirements created by administrative and judicial interpretations of the Truth in Lending Act.

Judge Weis also refers to "the $300 exemption under Pennsylvania law" and suggests that if notice of such exemptions were required to be included it should set out as well the exemp-

tions to that exemption under the statute just as exemptions for certain pension benefits must be included if Social Security payments are to be declared exempt in the notice to the judgment debtor. Finally, he comments that he was "not impressed with the equities of imposing additional procedural burdens on a creditor who has already been put to the trouble and expense of securing a judgment against a debtor who has failed to meet his obligations.... Some responsibility for safeguarding the exemption could be placed upon the debtor." Id. at 93, 94.

In Dionne v. Bouley, supra, the court ruled that a decision similar to that under review in requiring notice to judgment debtor of all exemptions at time of the attachment was in error, saying (757 F.2d at 1354):

> We do not agree that, to be constitutional, the notice provided to a judgment debtor after attachment must inform him of all, or even close to all, of the available exemptions. In a somewhat analogous situation, the Court has said

that due process requires notice to be "reasonably calculated, under all the circurmstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." . . . In the present situation we think the debtor must be informed of the attachment and of the availability of a prompt procedure to challenge the attachment, . . . together with the fact, generally stated, that there are certain exemptions under state and federal law which the debtor may be entitled to claim with respect to the attached property. The state, however, is not required to supply the debtor with a "laundry list" of statutory exemptions. The latter requirement, we think, gives insufficient weight to the state's interest in avoiding overly burdensome requirements. . . . We know of no parallel situation where the due process clause has been held by the Supreme Court to mandate judicial enactment of a kind of "truth in lending" provision. We are persuaded by the dissenters in Finberg v. Sullivan that a detailed list of state and federal exemptions is neither required by the Constitution nor would it, in the final instance, be useful to the debtors. . . . A detailed requirement of this type which would have to be constantly updated whenever state or federal law was revised--contradicts the spirit of modern civil procedure which encourages notices to be effected in a single, concise and direct manner. . . In any case, while of course the state is free to adopt such an elaborate requirement if it wants, we do not think the Constitution compels it. (citations omitted)

We are persuaded by the reasoning in the Finberg dissents and in Dionne that due process does not mandate that the notice to the judgment debtor of the attachment should include a list of all the exemptions possibly available to the judgment debtor; it is sufficient that the notice alert the judgment debtor "that there are certain exemptions under state and federal law which the debtor may be entitled to claim with respect to the attached property, and that there is available a prompt procedure for challenging the attachment."

Even the decisions which require some specification of exemptions shy away from requiring a listing of all exemptions. Most of these decisions, as we have seen, identify only one or two exemptions which they would require to be specified in the notice. Such decisions give diverse reasons for the specification they require. In Neeley, for

instance, the court said those exemptions "that occur frequently" should be identified in the notice but the court failed to indicate which exemptions would qualify under this ruling for specification, leaving that matter open for other litigation. Harris, after declaring that a "laundry list" specification of all exemptions "is not required by due process" laid down the rule that only those exemptions which cover moneys "that provide the basic necessities of life for someone in Mrs. Harris' position," a rule which at least, the court says, should include Social Security payments. Finberg established much the same rule, if Mrs. Finberg claimed such exemptions but only if she did. All of these standards for determining which exemptions to be specially identified in the notice to the judgment debtor are elusive and indefinite, mere encouragement to confusion, misunderstanding

and other litigation. Must a judicial officer determine at his peril whether an exemption "occur[s] frequently" or what exemption was necessary in the case of one whose condition was like either Mrs. Harris' or Mrs. Finberg's in order to provide them with "the basic necessities of life," which we would assume would be related to the judgment debtor's age, education, financial condition, etc.? A requirement for listing all exemptions or an abbreviated or "fragmented" list of such exemptions under the standards set by Finberg and its progeny would create a "veritable Frankenstein, a complicated procedure that far exceeds the hurt it is designed to heal and will, in the end, prove counterproductive," as Judge Aldisert correctly observed. We are satisfied that a notice which advises the judgment debtor that there are state and federal exemptions that may be available to him, coupled with notice of the

right to contest the attachment, meets the requirements of due process. The notice provided in the revised Rules in this case meets this test.4/

The district court, also, found that a requirement of a "prompt" hearing on a judgment debtor's claim of exemptions against a writ of garnishment violated due process. It held specifically that the Rules would

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4/ While the revised Rule issued by the Court of Appeals of Maryland clearly states that the writ of attachment served on the judgment debtor shall "notify the judgment debtor that federal and state exemptions may be available" (Rule 3-645 (c)(4)), the appellees have attached in an addenda to their brief a form of attachment (see pp. 2-3 of the "Addenda to Brief of Appellees"), which is not in the form prescribed by the Rule--which, in fact, does not refer to federal exemptions at all--and which the appellees suggest is the form still used by the state courts. The district court should inquire on remand whether the form of writ now in use conforms to the Rule noticing the judgment debtor that there may be federal and state exemptions available to him. If the form in use does not conform, and is in the language set forth in appellees' "Addenda," the district court should require prompt revision of the writ of attachment form.

satisfy due process only if they provided explicitly that the hearing on any challenge to the writ be heard "within two weeks." It justified such inflexibility in the statute because, without such an absolute requirement, the rights of the judgment debtor could be "too easily abused" and there was too much "opportunity for constitutional deprivation." We are unable to agree--at least on the present record before us.

The Rules issued by the State Court mandate that the hearing on the judgment debtor's request for a hearing on his exemption claim shall be held "promptly." That, incidentally, was all that the plaintiffs in this case asked for in their prayer for relief when they commenced this action. Thus, in their "Statement of Claim" in their complaint they asserted that the Rules then in force failed to "require a prompt hearing when requested by the judgment debtor to contest

an attachment." (Italics added). The amended Rules, however, provide them with a right to "a prompt hearing." In determining whether, despite the amendment of the Rules to provide for the "prompt" hearing that the plaintiffs had requested in their prayer for relief, the district judge was correct in promulgating under due process a specific time limit within which a hearing to contest an attachment or garnishment should be held under the Maryland procedure, we begin by noticing, as did the court in Trans-Asiatic Oil, Ltd. S.A. v. Apex Oil Co., 743 F.2d 956, 960 (1st Cir. 1984) that "'[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'"[5/] Further, federal courts should be loath both on grounds of comity and federalism to intrude upon the rule-making

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5/ Quoting from Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

functions of state courts and, even in those rare instances when compelled to do so under their duty to uphold federal constitutional rights, should act cautiously and with moderation. And this principle has particular applicability where state judicial procedures are concerned. See dissenting opinion of Aldisert,J. in Finberg at 69-70, especially note 6.

It is a new idea that federal courts should fetter state courts with inflexible time frames for the administration of their courts. Only in Finberg prior to this case has an appellate court imposed on state courts under due process a rule requiring that all challengers to an attachment or garnishment be heard within two weeks; other courts have followed a more flexible course, finding due process satisfied by a requirement of a "prompt" or "expeditious" hearing. In Dionne for instance, the court recognized,

as has the Court of Appeals of Maryland, that the judgment debtor is entitled to "a prompt post-attachment hearing," p. 1357, but it eschewed any attempt at stating that term in strict mathematical terms (i.e., fifteen days). In McCahey v. L.P. Investors, 774 P.2d at 552, 553 the court was confronted with an objection to the New York garnishment statute which provided for an "expeditious" or "prompt" hearing on exemption claims by the judgment debtor. The judgment debtor asserted the statute was constitutionally defective because it did "not provide a mandatory outside time limit on according a hearing on an exemption claim." The court refused to find the statute invalid on this ground, saying that "we are unwilling to invalidate a statute because it might, but need not, be applied in an unconstitutional manner." The Supreme Court itself in North Georgia Finishing, Inc. v. Di-Chem, Inc., 419

U.S. 601, 606 (1975), which was a pre-judgment attachment where a party would be expected to enjoy greater rights than one who has already been adjudged judicially liable, required only an "early hearing," or as Justice Powell stated in his concurring opinion, "a prompt and adequate hearing," p. 613. It is true this was an admiralty case and not one involving a garnishment of an individual's bank account; but it is important to emphasize that it was a pre-judgment attachment and not, as here, a post-judgment attachment. Trans-Asiatic, supra, also involved a pre-judgment attachment in admiralty. It found that "a hearing within four weeks of [the defendant's] request for an expedited hearing" on the validity of the attachment met the standard for promptness. 743 F.2d at 962. In Deary v. Guardian Loan Co., 534 F.Supp. 1178 (S.D.N.Y. 1982) the court, though it agreed with Finberg that

notice of exemptions should be given the judgment debtor in state garnishment post-judgment proceedings because required by state statute, did not follow Finber on the requirement of an inflexible standard for the holding of a hearing on a challenge to the writ of attachment, saying only (p. 1188):

> Assuming without deciding that some prompt post-enforcement procedure would satisfy constitutional requirements, the opportunity to challenge the enforcement action must not be unnecessarily delayed.

In Brown, supra, the Fifth Circuit indicated that unless "there [was] an extended delay in setting the hearing on the exemption in state courts," there was no occasion for action by a federal court on due process grounds. (Italics added.)

In this case, there is no evidence of "extended delay," no "foot-dragging" or dilatoriness by the state courts in disposing of challenges to garnishment proceedings. Two of the claims in this case had the hearing

set and the contest disposed of within two weeks after the judgment debtors filed their claims of exemptions and this occurred when the judgment debtors were proceeding pro se. In the third case, the claim of exemption was disposed of within a month. In that case, the judgment debtor was represented by counsel which would suggest that the proceeding may have presented some unusual features. In any event, there is no basis for a finding of any "extended delay" or inattention to these claims of exemptions by the state courts in these three cases. In fact, there is no allegation of such a delay in the complaint nor is there any basis in the record for a finding that the hearings in any of the three cases were unduly delayed.[6/]

6/ All three of these cases were disposed of when the hearing requirement was "forthwith" and not "promptly" as in the present Rule. We seriously question, however, whether the state courts will become less diligent in disposing of claims of exemptions in garnishment proceedings simply because the Rule has

The district court, however, found "promptly" too neutral a term for fixing the time within which a hearing or the challenge to the garnishment was to be held, even though that term was used approvingly by the Supreme Court in Di-Chem, because, it said, it was a term "too easily abused" in practice and fraught with "the opportunity for constitutional violation." We are unable to accept this as a basis for imposing on the courts of Maryland an inflexible rule governing procedure in the administration by the courts of that state of proceedings such as those involved here when, as here, there is no credible evidence of "extended delay" on the part of the Maryland courts in disposing of challenges by garnishees to the writ of attachment. That is not to say that if at some future date there should be evidence of

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substituted "promptly" for "forthwith," and, therefore, regard the change of little or no moment.

"extended delay" in any other case and something more than mere hypothetical scenarios of possible judicial abuse shown, a federal court will stay its hand. But, without any evidence of such delay in this case, the district court erred in undertaking in this record to tether the state's proceedings to any mathematical rule for disposing of the challenge to the writ of attachment and to invalidate the state procedure "because it might, but need not, be applied in an unconstitutional manner." See McCahey.

The judgment of the district court enjoining the state courts of Maryland in their garnishment proceedings, to include a list of all federal and state exemptions in the notice of garnishment served on the judgment debtor and to provide on request a hearing on any challenge by a judgment debtor to the garnishment writ within fifteen days after the filing of the request is accord-

ingly vacated and the cause is remanded to the district court for the entry of an appropriate order in conformity with this decision.

VACATED AND REMANDED.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent. I believe that there is no case or controversy and that we are without subject matter jurisdiction to decide the merits.

The majority's reliance upon Harris v. Bailey, 675 F.2d 614 (4th Cir. 1982), I suggest, is misplaced.1/ The plaintiff in Harris filed her § 1983 action before her

1/ As I indicate, Harris is distinguishable from our case on its facts. If the majority feels it is not, however, then we should simply decline to follow the 1982 circuit precedent in favor of the 1983 Supreme Court precedent.

state garnishment proceeding was decided. 675 F.2d at 616. Traditional doctrines of mootness were held to be applicable because there was at least an actual controversy existing regarding the accounts which had been garnished at the time the federal case was filed. Here all three of the state garnishment proceedings were concluded in the plaintiffs' favor before this § 1983 action was filed. Plaintiff Esther Reigh's account was held exempt from attachment by a state court ruling on July 29, 1982. Plaintiffs Ivery Mae Simpkins and David Simpkins received a state court ruling exempting their account on December 6, 1982. Plaintiff Lenora C. Dannie received a state court order exempting her account on December 29, 1982. This suit was filed in the district court on January 24, 1983. Thus no controversy existed when the federal suit was filed. All that was present was the fear of future con-

troversy.

I think City of Los Angeles v. Lyons, 461 U.S. 95 (1983) requires the dismissal of this action on the ground that no case or controversy exists. In Lyons the plaintiff sought an injunction[2/] against the City barring the use of choke-holds by police officers. Lyons had been the victim of such control hold procedures in the past and argued that he could again be the subject of such a procedure in the future absent judicial relief. While the Court did not find Lyons' claim moot it found that the complaint did not allege a case or controversy to satisfy the threshold requirements of Article III of the Constitution. Relying upon the language of O'Shea v. Littleton, 414 U.S. 488, 495-6 (1974) the Court said "[p]ast

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2/ Lyons also sought damages against the City of Los Angeles for past use of the procedure. The Court's opinion does not effect [sic] that portion of Lyons' claim.

exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . . if unaccompanied by any continuing, present adverse effects." Lyons, supra at 102.

Plaintiffs here sought to have the state post-judgment attachment procedure declared unconstitutional and its enforcement enjoined. They have alleged no more than Lyons did, that is that they were exposed to illegal conduct in the past. Their belief that their bank accounts may again be attached does not create a case or controversy that must be present to invoke federal court jurisdiction. Lyons, supra at 104.

I would therefore vacate the judgment below and remand with instructions that the district court dismiss the action for want of a case or controversy under Article III of the Constitution.

IN THE UNITED STATES SUPREME COURT

Esther V. REIGH and Ivery Mae Simpkins and Lenora C. Dannie, petitioners, v. Charles L. SCHLEIGH, etc., et al. No. 85-7231.

Case below, 595 F.Supp. 1535; 784 F.2d 1191.

Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

October 6, 1987. Denied.

Justice SCALIA took no part in the consideration or decision of this petition.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ESTHER V. REIGH,
IVERY MAE SIMPKINS,
DAVID MICHAEL SIMPKINS,
and LENORA C. DANNIE

v. CIVIL ACTION
NO. M-83-245

CHARLES L. SCHLEIGH, in his official capacity as Principal: Clerk of the District Court for Washington County; NANCY E. MUELLER, in her official capacity as Clerk of : the District Court for Howard County; and WILLIAM A. DORSEY, : in his official capacity as Administrative Clerk of the District Court of Baltimore City

Filed: October 29, 1984. (595 F.Supp. 1535).

MILLER, District Judge.

MEMORANDUM AND ORDER

On January 24, 1983, the plaintiffs, Esther V. Reigh, Ivery Mae Simpkins, David Michael Simpkins, and Lenora C. Dannie, filed

this suit against Charles L. Schleigh, in his official capacity as Principal Clerk of the District Court for Washington County; Nancy E. Mueller, in her official capacity as Clerk of the District Court for Howard County, and William A. Dorsey, in his official capacity as Administrative Clerk of the District Court of Baltimore City. Plaintiffs allege that the defendants, in issuing orders of attachment pursuant to the post judgment procedures in Rules F1 through F5 of the Maryland District Rules, have deprived the plaintiffs of property without due process of law by failing (a) to cause a timely notice to be served upon the judgment debtor prior to, or immediately subsequent to, service of the Order of Attachment upon the garnishee; (b) to serve notice which would inform the judgment debtor of the available state and federal exemptions and the procedure whereby he or she can obtain a hearing to contest the attachment;

and (c) to require a hearing within a specified number of days to resolve a contested attachment when requested by the judgment debtor. The plaintiffs prayed for a judgment declaring the then current Maryland District Rules governing post judgment attachment unconstitutional; the permanent enjoining of the issuance of post judgment orders for attachments by defendants until the Maryland District Rules are revised to require timely, adequate notice and timely opportunity for a hearing; an award of reasonable costs and attorney's fees; and such other and further relief as this court deems just and proper (Paper No. 2).

The defendants filed a Motion to Dismiss asserting that (1) no case or controversy existed, and (2) the plaintiffs had failed to state a claim upon which relief could be granted (Paper No. 9). Thereafter, with the consent of counsel for defendants, plaintiffs

amended their complaint asserting as an additional cause of action, based on the same acts underlying the original complaint, a violation of the Supremacy Clause of the United States Constitution (Paper No. 12).

On May 6, 1983, the plaintiffs filed a Motion for Summary Judgment, incorporating their memorandum in support of their Opposition to the defendants' Motion to Dismiss and submitting affidavits of the plaintiffs (Paper Nos. 13-15, 22). The defendants filed a Cross Motion for Summary Judgment and a response to the plaintiffs' Motion for Summary Judgment on July 1, 1983 (Paper No. 18), in which they reasserted contentions made in their Motion to Dismiss and also asserted that (1) the rule changes sought by the plaintiffs were then under consideration for adoption by the Maryland Court of Appeals, mooting this case, and (2) that the Maryland District Rules, as then currently codified,

did not violate the plaintiffs' due process rights or the Supremacy Clause of the United States Constitution. The plaintiffs filed a response to defendants' Cross Motion (Paper No. 19). A hearing was held on the motions on December 2, 1983.

I. Factual Background

A. Plaintiff Reigh

Plaintiff Esther Reigh is a seventy-year-old woman whose monthly income consists of $380.00 in Social Security and $43.14 from a pension from Fairchild Republic. Both checks are directly deposited into her account with the First National Bank of Maryland (FNB).

On September 23, 1981, the C & P Telephone Company obtained a judgment against plaintiff Reigh in the District Court for Washington County. On July 6, 1982, an Order of Attachment on Judgment was issued by an agent of the defendant Schleigh and, on July 7, 1982, was served on FNB. FNB immediately

froze the plaintiff's bank account on the same day and also mailed her notice informing her that it had been served with a writ of attachment and enclosing a copy of the Order for Attachment. On July 13, 1982, FNB mailed the plaintiff a copy of the garnishee's Confession of Assets.

On or about July 15, 1982, plaintiff Reigh, acting pro se, asked the District Court in Washington County to exempt her account at FNB from attachment. Her request was granted on July 29, 1982.

Plaintiff Reigh continues to be a judgment debtor to the C & P Telephone Company (Paper No. 2, ¶¶ 11-15; Paper No. 15, Reigh Affidavit).

B. Plaintiffs Ivery Mae and David Simpkins

Plaintiffs Ivery Mae and David Simpkins are mother and son. Ivery Mae Simpson is 52 years old and disabled. Her sole source of monthly income is $421.50 from Social Secur-

ity. Although married to a member of the merchant marine, she seldom receives any support from him and has received none from him since her bank account was attached in May of 1982. David Simpkins is 21 years old and attends Towson State University on a grant. His sole source of monthly income is $162.00 from Social Security.

On August 11, 1982, a judgment was entered in the District Court for Howard County against these plaintiffs in favor of the American Express Company. On October 7, 1982, an agent of the defendant Mueller issued an Order for Attachment on the plaintiffs' checking and savings accounts at Union Trust Company of Maryland (UT). The plaintiffs learned of the attachment on or about October 21, 1982 when they received copies of two letters from UT to the attorneys for UT which revealed that the plaintiffs had four bank accounts, two checking and two savings,

containing $426.20 with UT. A Garnishee's Confession of Assets was served on the plaintiffs on October 27, 1982 by UT.

On November 5, 1982, through counsel, Ivery Mae and David Simpkins filed a claim of exemption with the District Court for Howard County. On December 6, 1982, the exemption was granted.

These plaintiffs continue to be judgment debtors to the American Express Company (Paper No. 2, ¶¶ 17-23; Paper No. 13, Simpkins Affidavit).

C. Lenora C. Dannie

Plaintiff Lenora C. Dannie is 26 years old and lives with three dependent children. Her sole source of income is $355.00 a month from the Aid to Families with Dependent Children (AFDC) program.

On November 3, 1979, the Equitable Trust Bank obtained a judgment against the plaintiff and on December 13, 1982, an Order for

Attachment was issued. On December 13, 1982, her checking account containing $24.11 from AFDC at FNB was frozen. On December 14, 1982, FNB mailed a letter to the plaintiff, informing her that they had received the Order for Attachment.

On December 17, 1982, a claim of exemption was filed with the District Court of Baltimore City. The exemption was granted on December 29, 1982.

Dannie continues to be a judgment debtor to the Equitable Trust Bank (Paper No. 2, ¶¶ 25-30; Paper No. 13, Dannie Affidavit).

II. Existence of a Case of Controversy

The defendants assert that each plaintiff, who was subjected to the garnishment procedures outlined in Maryland District Rules, F1-F5, has since had the attachments quashed pursuant to Rule G51, Maryland District Rules. Therefore, since none of these plaintiffs have funds currently frozen under

the Maryland Post Judgment Attachment statute, defendants contend there is no case or controversy in existence as required by Article III of the United States Constitution and that the case must be dismissed.

Those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging a case or controversy, Sierra Club v. Morton, 405 U.S. 727, 732 (1972); Flast v. Cohen, 392 U.S. 83, 94-101 (1968); Jenkins v. McKeithen, 395 U.S. 411, 421-25 (1969), for the courts are precluded from issuing advisory opinions, Muskrat v. United States, 219 U.S. 346 (1911), and may only decide questions that can affect the rights of litigants in the case before them. North Carolina v. Rice, 404 U.S. 244, 246 (1971). Plaintiffs must demonstrate a "personal stake in the outcome" in order to ensure that concrete adverseness

which sharpens the presentations of the constitutional issues to be resolved. Baker v. Carr, 369 U.S. 186, 204 (1962). A plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged official conduct, policy or statute and that the injury or threat thereof is real and immediate, not conjectural or hypothetical. See, e.g., City of Los Angeles v. Lyons, 461 U.S. 95 (1983); Boyle v. Landry, 401 U.S. 77 (1971); Golden v. Zwickler, 294 U.S. 103, 109-10 (1969); Massachusetts v. Mellon, 262 U.S. 447 (1923). An actual controversy must exist at all stages of review. United States v. Munsingwear, Inc., 340 U.S. 36 (1950). The law, however, is not so rigid as to deny review in those instances in which the conclusion of the adjudication of the claims cannot occur before the facts underlying the claim must necessarily change. See, e.g.,

Super Tire Engineering v. McCorkle, 416 U.S. 115 (1974) (strikes); Storer v. Brown, 415 U.S. 724, 737 n.8 (1974) (state election laws); Roe v. Wade, 410 U.S. 113, 125 (1973); Doe v. Bolton, 410 U.S. 179 (1973) (pregnancy).

In Finberg v. Sullivan, 634 F.2d 50 (3d Cir. 1980) (en banc), the Third Circuit considered a motion to dismiss a lawsuit brought by plaintiff Finberg contesting the validity of Pennsylvania's post judgment garnishment proceedings. During the pendency of the state court garnishment proceedings, the plaintiff filed suit in federal court under 42 U.S.C. § 1983, asserting violations of the Due Process and Supremacy Clauses of the United States Constitution. Prior to the completion of the federal proceedings, and five months after initiating her claims of exemption in the state courts, the plaintiff recovered all of the money which had been

attached. The defendants asserted that, because the plaintiff had had her money returned, she no longer had a personal stake in the outcome, and the case should be dismissed as moot.

Judge Seitz, writing for the court, concluded that the case was one challenging "short term orders, capable of repetition, yet evading review," Southern Pacific Terminal Co., v. ICC, 219 U.S. 498 (1911), and, therefore, was not moot. He reasoned that the plaintiff had demonstrated a reasonable expectation that she would experience the reoccurrence of the activity:

> "In the present case, Mrs. Finberg does have some reason to fear that she will suffer another attachment of her bank accounts. She remains a judgment debtor. As the record indicates that she is an elderly widow with a modest income, this judgment could remain unsatisfied for some time. Future efforts to execute the judgment are therefore likely. Sterling might repeat its attempt to garnish the accounts. For example, when new funds accumulate in the accounts, Sterling might find that the garnishment process is the most efficient way of deter-

mining whether any of the new funds are exempt. We also cannot disregard the possibility that a successor to Sterling's interest, such as a collection agency, could make such an attempt.

Furthermore, Mrs. Finberg's modest income and the difficulties that she had demonstrated in this case in meeting the demands of a creditor indicate that she may incur another money judgment and suffer an attempted garnishment to execute it."

Finberg, 634 F.2d at 55-56.

More recently, the Fourth Circuit has considered a similar challenge and concluded that the case was not moot. Harris v. Bailey, 675 F.2d 614 (4th Cir. 1982). The plaintiff, a Social Security recipient, brought an action under 42 U.S.C. § 1983, alleging that the Virginia garnishment procedure violated the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 407, exempting paid Social Security benefits from garnishment procedures. The district court dismissed her suit when her monies were returned prior to its adjudication. The

Fourth Circuit reversed.

Judge Ervin, speaking for the panel, found the Harris facts to be similar to those of a previous case before the Court of Appeals for the Fourth Circuit, Hammond v. Powell, 462 F.2d 1053 (4th Cir. 1972). In Hammond, the plaintiff had challenged a South Carolina repossession statute on due process and equal protection grounds. Although the state repossession action was concluded before the federal case had been tried, the Fourth Circuit, after noting that "due to her poverty, appellant will likely again be subjected to the challenged statutory procedure," id. at 1055, and that the public interest was substantial, concluded that the case was not moot.

In Harris, after concluding that the procedure there involved, like that of Hammond, was of brief duration but one that is capable of repetition, yet evading review,

and finding the reasoning in Finberg to be persuasive, the Fourth Circuit held that the general rule, which denies judicial review when the principal cause becomes moot, did not apply. See Roe, 410 U.S. 113; Moore v. Ogilvie, 394 U.S. 814 (1969).

In the present case, the defendants point out that each of the above-discussed cases involved federal suits filed before the controversy had been settled and that the "capable of repetition" exception was used by those courts to conclude that the prior controversy was not mooted by the change in the plaintiffs' circumstances. In contrast, this case involves plaintiffs who filed suit after the Orders for Attachment had been quashed in state proceedings, a situation which defendants contend means that there has never existed a case or controversy in this suit.

The plaintiffs contend that the "capable of repetition" exception should apply to

cases in which the plaintiffs reasonably expect to be subject to the challenged procedures in the future, regardless of whether they are suffering actual injury at the time they file suit in federal court.

In the Supreme Court's most recent case on the subject, it concluded that the district court was without jurisdiction to entertain a plaintiff's claim for injunctive relief due to the failure to satisfy the "case or controversy" requirement of Article III. Lyons, 461 U.S. 95. The Court's conclusion that the plaintiff had no standing to challenge the Los Angeles police department's chokehold policy was based on the Court's determination that the nature of his claim was speculative in that it was unlikely that the plaintiff would suffer future injury from the use of chokeholds by police officers. For the same reason, the "capable of repetition" doctrine was held not to apply.

In reaching this conclusion, the Supreme Court reiterated the observations it had made in earlier cases. In O'Shea v. Littleton, 414 U.S. 488 (1974), particular members of the plaintiff class alleging the discriminatory enforcement of criminal law by state officials had actually suffered from the alleged unconstitutional practices. The Court observed that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing present adverse effects," although past wrongs were evidence bearing on "whether there is a real and immediate threat of repeated injury." Id. at 495-96. Since it was to be assumed that the plaintiffs in O'Shea would conduct themselves in a lawful manner, the possibility of threatened injury from the practice sought to be stopped was remote and a case or controversy did not

therefore exist. See also Ashcroft v. Mattis, 431 U.S. 171 (1977); Rizzo v. Goode, 423 U.S. 362 (1976); Golden, 394 U.S. 103.

In an earlier case, Juidice v. Vail, 430 U.S. 327 (1977), although the issue was not raised by either party, the Supreme Court examined the standing of all appellees to determine whether the case or controversy requirement associated with Article III of the United States Constitution had been met, thereby entitling the appellees to an opportunity to seek the injunction requested. The appellees sought to challenge the constitutionality of New York statutes authorizing a finding of contempt against judgment debtors. All but two of the appellees had, at the time the lawsuit commenced, already been imprisoned and released after payment of the court imposed fine. Id. at 331-32. Because the periods of incarceration had been served, the underlying judgment satisfied, or the fines

paid by some of the appellees, the effect of the orders imposing those fines no longer existed. The Supreme Court concluded that no case or controversy existed as to those appellees.

In reviewing the facts as to each of the appellees in Juidice v. Vail, the Court indicated that "the prospect of further contempt orders in the underlying action could have given Vail [the one appellee who had not satisfied the underlying judgment in addition to the court imposed fine for contempt] the requisite constitutional standing to seek to enjoin the contempt processes as unconstitutional." Id. at 333 n.9. Although the claims of this appellee were also dismissed because the complaint did "not allege the likelihood, or even the possibility, of future contempt orders," id., the Supreme Court indicated that standing may be present, under a pleading making appropriate allegations, despite

the absence of pending state proceedings at the time the suit in federal court is commenced challenging those proceedings.

Article III's requirement of the existence of a case or controversy is met by a demonstration of an injury or the threat of injury. Baker, 369 U.S. 186. The question of standing, whether at the outset or after litigation has begun, is the same: is there an injury or a threat of injury? The "capable of repetition" exception to the mootness doctrine is the label applied to a court's determination that there continues to be a threat of injury so that standing still exists. As the Supreme Court opinions in Vail, O'Shea, Lyons, and Baker reveal, a threat of injury, if real, is sufficient to fulfill Article III's requirement of the existence of a case or controversy at the outset of the federal litigation. See

Kolender v. Lawson. 461 U.S. 352 (1983).[1] The threat of injury was not present in O'Shea, Lyons, and Golden because the facts of those cases revealed that future injuries from challenged conduct were possibilities which were too speculative to ensure the "concrete adverseness" necessary for proper resolution of constitutional issues. Lyons, 461 U.S. 95. In Vail, the appellee's complaint did not even allege a future injury. The facts which gave rise to those determi-

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[1] In Kolender, the Supreme Court examined the constitutionality of a criminal statute which required persons who loiter or wander on the street to provide a "credible and reliable" identification and to account for their presence when so requested by a peace officer. Although the appellee, Lawson, had been detained or arrested on approximately 15 occasions, he was not being detained at the time he brought his civil action challenging the validity of the statute. The Court noted that the appellants had never challenged Lawson's standing to seek relief but went on to conclude that, in view of the number of previous stops, there was "a 'credible threat' that Lawson might be detained again" and, therefore, found the existence of a case or controversy. 461 U.S. 352, ___, n.3, 103 S.Ct. 1855, 1857 n.3.

nations of speculative injury are vastly different from the situation in the present case.

Although no longer suffering present injury from the challenged conduct, the plaintiffs in the case sub judice, like the one appellee in Vail, continue to be indebted on the underlying debts and have no assurance or indication that their present creditors will not again attempt collection of the debts. The plaintiffs in this case, in contrast to the Vail appellee, have alleged in their complaint and affidavits[2/] that their underlying judgment debts continue. They further alleged that, because of their poverty, all may be subjected to repeated attachment of their bank accounts.[3/]

2/ See Paper Nos. 13 (Simpkins and Dannie Affidavits), 15 (Reigh Affidavit).

3/ The Second Amended Complaint of the plaintiffs reads in pertinent part:

"a. Because of the fact that they are

As the Supreme Court in Vail indicated, and the Fourth and Third Circuits in Harris and Finberg recognized, a plaintiff's poverty and continued status as a judgment debtor make very real the threat of injury from procedures designed to permit collection of a debt. Unlike the Lyons, O'Shea, or Ashcroft cases, where the facts indicated reoccurrence of the injury was unlikely, here the plaintiffs, because of their poverty, will probably be injured again by the challenged procedures due to the actions of present or future creditors. For these reasons, the court concludes that these plaintiffs have standing to challenge Maryland's District

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judgment debtors and because of their poverty, all Plaintiffs may again be subjected to an attachment of their bank accounts or other personal property under the procedures in question.

b. The Plaintiffs' federal constitutional claims could not have been fully litigated in federal court before the state court proceedings ended and their bank accounts were released."

Paper No. 20.

Rules permitting post judgment orders of attachment to be issued. See Grimes v. Miller, 429 F. Supp. 1350, 1354 (M.D.N.C. 1977).[4/]

III. The Maryland District Rules

In Maryland, the procedural rules for the governance of the District Courts of Maryland at the time this suit was filed were separately codified as the Maryland District Rules, Chapters 1, 100-700, 1100-1300. Chapter 100, Subtitles G & F contained the herein challenged procedures to be followed by a judgment creditor seeking to obtain an attachment on a judgment.[5/]

4/ In Grimes, the District Court concluded that a case or controversy existed when the plaintiff did not file suit challenging the constitutionality of the North Carolina post-judgment body execution statute until after he had been released from imprisonment.

5/ The challenged rules provided as follows:

Rule F1. Service - Subsequent Procedure.

Under the challenged Maryland District

Where an attachment on a judgment shall have been issued pursuant to this Subtitle, it shall be served pursuant to M.D.R. (G47) (Service of Writ - Garnishment) but no trial date shall be assigned at the time of issuing the writ. The procedure shall conform to the provisions of Section d of M.D.R. (G42) (Documents to Be Filed - Instructions to the Sheriff) and M.D.R. (G51) (Motion to Quash), M.D.R. (G52) (Appearance of Garnishee) M.D.R. (G56) (Interrogatories to Garnishee - Notice Failure to Answer), M.D.R. (G57) (Dissolution of Attachment), M.D.R. (G58) (Claimant of Property Attached), and M.D.R. (G60) (Sale of Attached Property).

Rule F2. Appearance - Assignment for Trial.

a. Nulla Bona - Request for Hearing - Dismissal.

When a garnishee files a plea of nulla bona or a claim of total exemption, the plaintiff, within thirty days of the service of a copy of the plea or claim upon him, shall either dismiss the action or file a request for hearing. In the latter event the action shall be assigned for trial. In the absence of dismissal or request the court may assign the action for trial or dismiss the action without trial.

b. Other Appearances - Trial Date.

If a defendant, garnishee or claimant files an initial pleading, other than a plea of nulla bona or a claim of total exemption, the action shall be assigned for trial.

Rule F3. Default - Judgment of Condem-

Court garnishment rules in existence at the

nation Absolute.

If no defendant, garnishee, or claimant of the property attached by way of garnishment shall file his initial pleading within thirty days after service of the writ, the plaintiff may pursuant to M.D.R. 648 (Default) prove the amount of assets of the defendant in the hands of the garnishee subject to attachment; thereupon, judgment of condemnation absolute shall be entered against the garnishee.

Rule F4. Confession of Assets - Judgment of Condemnation Absolute.

Upon the filing of a confession of assets by the garnishee, the court may enter a judgment of condemnation absolute for the assets confessed, provided, however, that no claimant files his initial pleading within thirty days after service of the writ.

Rule F5. Execution.

The court may award execution upon a judgment of condemnation absolute at any time.

M.D.R. F6 concerned the post judgment garnishment of wages and is not relevant to the question presently before the court.

The following rules were incorporated into the post judgment garnishment procedures:

Rule G42. Documents to Be Filed.

time this suit was instituted, in order for a

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d. Instructions to the Sheriff.
Instructions to the sheriff as to the description and location of the property of the defendant to be attached.

Rule G47. Service of Writ - Garnishment.

a. Service on Garnishee.
A writ of attachment by way of garnishment may be served upon a person having property or credits belonging to the defendant.

b. Notice to Garnishee.
A writ of attachment by way of garnishment shall comply substantially with section e of M.D.R. 103 (Process - Issuance Return) and shall notify each person upon whom it is served to file in writing a defense pursuant to M.D.R. (G52) (Appearance of Garnishee) within thirty days after service of the writ, showing cause why the property or credits so attached should not be condemned.

Rule G51. Motion to Ouash.

a. Procedure.
A defendant or garnishee may file a motion within thirty days after service of the writ praying that the writ be quashed and set aside, and thereupon the court may order the sheriff to produce the writ and the proceedings thereunder in court.

b. Hearing.
The court shall upon notice to the adverse party hear the motion to quash forthwith.

c. Effect of Motion to Ouash Uoon

writ of attachment by way of garnishment to

Attachment.

The motion to quash shall not prevent further proceedings until the court shall order the writ of attachment quashed.

d. Attachment Quashed - Stay by Filing Bond.

If the writ of attachment is quashed and an appeal is taken, the writ of attachment shall remain in force pending the decision on appeal, provided that within 10 days of the decision by the court a bond shall be given conditioned upon the prosecution of such appeal with effect, or in default thereof to pay such costs and damages as the defendant or other person interested in such property or credits may incur or suffer by reason of such attachment and appeal. The amount of and the surety on such bond shall be determined and approved by the court.

Rule G52. Appearance of Garnishee.

a. Pleas.

The garnishee may file a pleading asserting on behalf of the defendant any defense which the defendant could assert, and also any defense on his own behalf.

b. Confession of Assets - Payment Into Court.

The garnishee may confess such assets including money, as he has in his hands, and may pay into court the money in his hands to be awarded to the party having a legal right thereto.

c. Confession of Assets - Proceedings.

If the plaintiff shall claim a larger

issue the judgment creditor filed instructions to the sheriff as to the description and location of the debtor's property to be attached. M.D.R. F1, G42d. The writ was then served on the garnishee, the person having property or credits belonging to the defendant. M.D.R. F1, G47a. The writ of attachment was required to notify each person upon whom it was served, i.e., the garnishee(s), to file in writing a defense, G52, within thirty days after service of the writ.

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amount than the assets confessed, the garnishee shall be allowed the costs of the action and an attorney's fee to be fixed by the court, unless the plaintiff shall recover judgment against the garnishee in excess of the assets confessed.

d. Plea of Nulla Bona.

If upon a plea of nulla bona contested by the attaching creditor, judgment shall be entered for the garnishee, the plaintiff shall be adjudged to pay to the garnishee an attorney's fee to be fixed by the court and the costs of the action.

The remaining six Rules, formerly incorporated by reference into the post judgment proceedings, do not concern the issues presented in the present case.

If a claim of total exemption was filed by the garnishee, the creditor, within thirty days, must have either dismissed or requested a hearing. If a hearing was requested, the matter was set for trial. M.D.R. F2. If some other initial pleading by the garnishee or the debtor was filed, the case was also set for trial. M.D.R. F2b.

Alternatively, the judgment debtor could obtain the dissolution of the writ by giving a bond in an amount equal to the attached property. M.D.R. F1, G57.

A final alternative under the former rules was for the garnishee or the debtor to file a motion to quash the writ. Such a motion must have been filed within thirty days of the service of the writ on the garnishee. M.D.R. F1, G51a. The court then, upon notice to the creditor, was required to hear the motion to quash "forthwith." M.D.R. F1, G51(b). The writ of attachment by way of

garnishment remained in effect until it was quashed. M.D.R. F1, G51c.

If no defense was filed within the thirty-day period after service of the writ, the judgment creditor could prove the amount of the debtor's assets in the hands of the garnishee, and a Judgment of Condemnation Absolute would thereupon be entered against the garnishee. M.D.R. F3. If the garnishee filed a Confession of Assets, the court could enter a Judgment of Condemnation Absolute. M.D.R. F4. Execution of Judgments of Condemnation Absolute could be awarded by the court at any time. M.D.R. F5.

At the December 2, 1983 hearing, this court observed that on October 21, 1983, the Maryland Court of Appeals had ordered the adoption of amendments to the Maryland District Rules, Chapter 1100, Subtitle G and Subtitle F. These changes were subsequently printed in the Maryland Register. Md. Admin.

Reg. Vol. 10, Issue 23 (Nov. 11, 1983).6/

6/ The Maryland District Rules regarding post judgment garnishment procedures are set forth below as amended by the October 21, 1983 Order of the Maryland Court of Appeals. The matter contained in the brackets is deleted from the former Maryland District Rules. The matter which is underlined is any new material added by the October 21, 1983 amendments:

CHAPTER 1100 - SPECIAL PROCEEDINGS
SUBTITLE F - ATTACHMENT ON JUDGMENT - PROCEDURE

AMEND Rule F1 to correct the rule references, as follows:

M.D.R. F1. Service - Subsequent Procedure.

Where an attachment on a judgment shall have been issued pursuant to this Subtitle, it shall be served pursuant to M.D.R. G[47]50 (Service of Writ - Garnishment) but no trial date shall be assigned at the time of issuing the writ. The procedure shall conform to the provisions of [Section d] subsection b 4 of M.D.R. G[42]40 (Documents to Be Filed Instructions to the Sheriff) and M.D.R. G51 [(Motion to Quash)] (Release of Property - Dissolution of Attachment), M.D.R. G52 (Appearance of Garnishee), M.D.R. G56 (Interrogatories to Garnishee Notice - Failure to Answer), [M.D.R. G57 (Dissolution of Attachment),] M.D.R. G58 (Claimant of Property Attached), and M.D.R. G60 (Sale of Attached Property).

The amended G Rules referenced in F1 of the M.D.R. post garnishment procedures are set forth below:

The majority of these changes dealt with

M.D.R. G40. [Against Whom] When Available - [M.D.R. G42.]
Documents To Be filed

a. Availability

An attachment on original process or while an action is pending may issue against any property or credits, whether matured or unmatured, belonging to the debtor upon the application of [any person who has the right to become] a plaintiff [in an action in this State in any of the following instances:] who is entitled by statute to attachment before judgment.

[a. Nonresident Debtor.

Where the debtor is a nonresident individual or if a corporation, where the corporation does not have a resident agent.

b. Resident Defendant Evading Service. Where a resident individual defendant or an agent authorized to accept process for a corporation has acted to evade service.

c. Absconding Debtor.

Where the debtor has absconded or is about to abscond from this State, or if an individual has removed, or is about to remove, from his place of abode in this State with intent to defraud his creditors.

d. Fraud.

Where the debtor is about to assign, dispose of, conceal or remove his property or some portion thereof from the State with intent to defraud his creditors, or where such debtor has done any of such acts or fraudulently contracted the debt or incurred the obligation respecting which the action is brought.

e. Nonresident Heir and Devisee.

Where an adult nonresident is entitled by descent or devise to any land or tenement

amendments to the G Rules, the statutory

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lying within this State, and the person from whom such land or tenement descended or by whom the same were devised was indebted to any person, an attachment may issue against the land or tenement held by descent or devise from the person so indebted.] Cross Reference: Code, Courts Article, §§ 3-302, 3-303, 3-304, 3-305.

b. Documents to be Filed.

Attachment proceedings shall be commenced by filing with the clerk the following:

[a]1. [Statement of Claim] Request for Writ.

A [Statement of the plaintiff's claim] request for an order directing the issuance of a writ of attachment.

[b]2. Affidavit

An affidavit by the plaintiff or by some person on the plaintiff's behalf, setting forth facts upon which plaintiff claims he is entitled to the issuance of attachment [on original process] on one or more of the grounds in [M.D.R. G40 (Against Whom Available)] Code, Courts Article. § 3-303, and except in an action for unliquidated damages, that the debtor is bona fide indebted to the plaintiff in the amount claimed. In an action for unliquidated damages the facts recited in the statement of claim shall be verified by the plaintiff or someone on his behalf.

[c]3. Statement of Claim and Documentary Evidence of Claim. When attachment on original process is requested, a statement of the plaintiff's claim and either the original, or sworn, certified or photostatic copies of all material papers or parts thereof which constitute the basis of the claim, unless the absence thereof is explained in

procedures governing attachment before

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the affidavit.

[d]4. Instructions to the Sheriff.

Instructions to the sheriff as to the description and location of the property of the defendant to be attached.

[e. Bond When Necessary - Amount.

In an attachment on original process for fraud under section d of M.D.R. G40 (Against Whom Available), and in an action ex contractu for unliquidated damages, and in an action ex delicto under sections a and c of M.D.R. G40 (Against Whom Available), a bond to the State shall be filed with such surety as may be approved by the clerk and conditioned upon the satisfaction of costs and such damages as may be awarded to such defendant or a claimant of the property attached. The amount of the bond shall be the sum alleged to be due from the defendant.]

M.D.R. G[47]50. Service of Writ - Garnishment.

a. Service on Garnishee.

A writ of attachment by way of garnishment may be served upon a person having property or credits belonging to the defendant.

b. Notice to Garnishee.

A writ of attachment by way of garnishment shall comply substantially with section e of M.D.R. 103 (Process - Issuance - Return) and shall notify each person upon whom it is served to file in writing a defense pursuant to M.D.R. G52 (Appearance of Garnishee) within thirty days after service of the writ, showing cause why the property or credits so attached should not be condemned.

[M.D.R. G51. Motion to Quash.

judgment. Because, however, the post

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a. Procedure.

A defendant or garnishee may file a motion within thirty days after service of the writ praying that the writ be quashed and set aside and thereupon the court may order the sheriff to produce the writ and the proceedings thereunder in court.

b. Hearing.

The court shall upon notice to the adverse party hear the motion to quash forthwith.

c. Effect of Motion to Quash Upon Attachment.

The motion to quash shall not prevent further proceedings until the court shall order the writ of attachment quashed.

d. Attachment Quashed - Stay by Filing Bond.

If the writ of attachment is quashed and an appeal is taken, the writ of attachment shall remain in force pending the decision on appeal, provided that within 10 days of the decision by the trial court a bond shall be given conditioned upon the prosecution of such appeal with effect, or in default thereof to pay such costs and damages as the defendant or other person interested in such property or credits may incur or suffer by reason of such attachment and appeal. The amount of and the surety on such bond shall be determined by the court.]

M.D.R. G[57]51. Release of Property - Dissolution of Attachment

A defendant who has appeared may [dissolve an attachment] obtain release of the attached property by giving bond in an amount equal to the value of the property as deter-

judgment garnishment procedures contained in

mined by the court, or in the amount of the plaintiff's claim, whichever is less, with such surety as may be approved by the clerk to satisfy any judgment that may be recovered.

Upon motion of a defendant who has appeared, the court may release some or all of the attached property if it finds that (1) the claim has been dismissed or settled, (2) the plaintiff has failed to comply with the provisions of this Rule or an order of court regarding these proceedings, (3) property of sufficient value to satisfy the claim and probable costs will remain subject to the attachment after the release, or (4) the attachment of the specific property will cause undue hardship to the defendant and the defendant has delivered to the sheriff or made available for levy alternative property sufficient in value to satisfy the claim and probable costs.

Upon motion of a defendant or garnishee, the court may release some or all of the attached property on the ground that the property is exempt or it may dissolve the attachment on the ground that the plaintiff is not entitled to attachment before judgment. If the motion is filed before the defendant's Notice of Intention to Defend is due pursuant to M.D.R. 302, its filing shall be treated as an appearance for that purpose only.

A party desiring a hearing on a motion filed pursuant to this section shall so request in the motion or response and if requested, a hearing shall be held promptly.

M.D.R. G56. Interrogatories to Garnishee - Notice - Failure to Answer.

Subtitle F incorporate by reference some of the G Rule procedures, Rule F1 was amended to incorporate the changes in the G Rule references.

The only substantive change, as of October 21, 1983, in the post judgment garnishment procedures which are challenged in this suit is the change in Rule G51. The former Rule G51, providing the procedure for filing a motion to quash the writ, was dele-

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Interrogatories may be served by the plaintiff upon the garnishee pursuant to M.D.R. 417 (Discovery by Interrogatories to Party). They shall contain a notice to the garnishee that, unless answers are filed within thirty (30) days after service of the interrogatories [judgment may be entered against him in the full amount of the plaintiff's claim] the garnishee may be held in contempt of court. If a garnishee shall fail to answer interrogatories, within the time allowed by section b of Rule 417 (Discovery by Interrogatories to Party), then upon proof of service of the interrogatories the court on motion [and notice] may enter [a judgment against the garnishee for the full amount of the plaintiff's claim] an order in compliance with Rule P4 treating the failure to answer as a contempt and may require the garnishee to pay reasonable attorney's fees and costs.

ted to accommodate the adoption of a new Rule G51, a comprehensive rule covering release of property and dissolution of attachment. The specific change in the procedures challenged by the plaintiffs and contained in the new Rule G51, as of October 21, 1983, was that now a hearing on a motion to release property or to dissolve the attachment pursuant to Rule G51 must be requested by a party, and once requested, the hearing shall be held "promptly," rather than "forthwith," as required by the former Rule G51(b). The remaining procedures or lack thereof challenged by the plaintiffs remained unchanged in the October 21, 1983 change in the rules.

IV. Latest Changes in the Maryland District Rules

In their motions before this court, the defendants asserted that the changes in the Maryland District Rules that the plaintiffs sought were then currently under consideration and were expected to be put into effect

in the next several months after the December, 1983 hearing. The defendants referred to the Tentative Draft of the Revised Maryland Rules of Procedure, published in November, 1982, by the Rules Committee of the Judiciary of Maryland. (Preface, Tentative Draft).

As the plaintiffs accurately pointed out, the proposed rules contained in the Tentative Draft revised only the procedures of the Circuit Courts of Maryland and did not affect or attempt to alter the District Rules which contain the procedures challenged in the present case.

At the December 2, 1983 hearing, however, the defendants submitted to the court a copy of the proposed Eighty-Eighth Report of the Standing Committee on Rules of Practice & Procedure. In that report, which was later submitted to the Court of Appeals on December 9, 1983, the Rules Committee proposed amend-

ments to the Maryland District Rules. (Defendants' Exhibit No. 4). Md. Admin. Reg. Vol. 10, Issue 25 (Dec. 9, 1983). Three specific proposed rules were called to the court's attention, 3-311, 3-643, and 3-645.[7/]

7/ The pertinent proposed rules submitted by the Rules Committee are set forth below:

Rule 3-311. MOTIONS

(a) Generally

An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, and shall set forth the relief or order sought.

(b) Statement of Grounds

A written motion and any response to a motion shall state with particularity the grounds.

(c) Hearing - Motions for New Trial or to Amend the Judgment

When a motion is filed pursuant to Rule 3-533 or 3-534, the court shall determine in each case whether a hearing will be held, but it may not grant the motion without a hearing.

(d) Hearing - Other Motions

A party desiring a hearing on a motion, other than a motion filed pursuant to Rule 3-533 or 3-534, shall file a timely written request. The request of the moving party shall be included in the motion under

These proposed changes to the Maryland

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the heading "Request for Hearing," and the request of a party served with a motion shall be made by filing a "Request for Hearing" within five days after service. Upon a timely request, a hearing shall be held except as provided in Rule 3-421(g). The court may hear and decide the motion before or at trial. If no hearing is requested, the court may decide the motion without a hearing at any time.

Rule 3-643. RELEASE OF PROPERTY FROM LEVY

(a) Upon Satisfaction of Judgment

Property is released from a levy when the judgment has been entered as satisfied and the costs of the enforcement proceedings have been paid.

(b) Upon Posting Bond

The judgment debtor may also obtain release of property from a levy by filing a bond in an amount sufficient to satisfy the judgment and enforcement costs.

(c) Upon Motion of Judgment Debtor

Upon motion of the judgment debtor, the court may release some or all of the property from a levy if it finds that (1) the judgment has been vacated, has expired, or has been satisfied, (2) the property is exempt from levy, (3) the judgment creditor has failed to comply with these rules or an order of court regarding the enforcement proceedings, (4) property sufficient in value to satisfy the judgment and enforcement costs will remain under the levy after the release, (5) the levy upon the specific property will cause undue hardship to the judgment debtor

District Rules[8/] were later adopted by the

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and the judgment debtor has delivered to the sheriff or made available for levy alternative property sufficient in value to satisfy the judgment and enforcement costs, or (6) the levy has existed for 120 days without sale of the property, unless the court for good cause extends the time.

The motion and any response to the motion may be accompanied by a request for court review of the sheriff's appraisal made at the time of the levy.

(d) Upon Election of Exemption by Judgment Debtor

By motion filed within 30 days after a levy, the judgment debtor may elect to exempt from execution of the judgment selected items of property or cash not exceeding in amount the cumulative value permitted by law. The motion and any response to the motion may be accompanied by a request for court review of the sheriff's appraisal made at the time of the levy. The court shall release from the levy items of cash or property selected by the debtor to the extent required by law.

(e) Upon Claim of a Third Person

A person other than the judgment debtor who claims an interest in property under levy may file a motion requesting that the property be released. The motion shall be served on the judgment creditor and, if reasonably feasible, on the judgment debtor. If the judgment debtor is not served and does not voluntarily appear, the claimant shall file an affidavit showing that reasonable efforts have been made to ascertain the whereabouts of the judgment debtor and to

Maryland Court of Appeals on April 6, 1984,

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provide the judgment debtor with notice of the motion. The court may require further attempts to notify the judgment debtor. The judgment creditor or the judgment debtor may file a response to the motion.

Rule 3-645. GARNISHMENT OF PROPERTY - GENERALLY

(a) Availability

This Rule governs garnishment of any property of the judgment debtor, other than wages [subject to Rule 3-646] and a partnership interest subject to a charging order, in the hands of a third person for the purpose of satisfying a money judgment. Property includes any debt owed to the judgment debtor, whether immediately payable, unmatured, or contingent.

(b) Issuance of Writ

The judgment creditor may obtain issuance of a writ of garnishment by filing in the same action in which the judgment was entered a request that contains (1) the caption of the case, (2) the amount owed under the judgment, (3) the name and last known address of the judgment debtor, and (4) the name and address of the garnishee. Upon the filing of the request, the clerk shall issue a writ of garnishment directed to the garnishee.

(c) Content

The writ of garnishment shall:

(1) contain the information in the request, the name and address of the person requesting the writ, and the date of issue,

(2) direct the garnishee to hold the

effective July 1, 1984. Md. Admin. Reg. Vol.

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property of the judgment debtor subject to further proceedings,

(3) notify the garnishee of the time within which the answer must be filed and that failure to do so may result in judgment by default against the garnishee,

(4) notify the judgment debtor and garnishee that federal and state exemptions may be available,

(5) notify the judgment debtor of the right to contest the garnishment by filing a motion asserting a defense or objection.

(d) Service

The writ shall be served on the garnishee in the manner provided by Chapter 100 of this Title for service of process to obtain personal jurisdiction and may be served in or outside the county. Promptly after service upon the garnishee, the person making service shall mail a copy of the writ to the judgment debtor's last known address. Proof of service and mailing shall be filed as provided in Rule 3-126. Subsequent pleadings and papers shall be served on the creditor, debtor, and garnishee in the manner provided by Rule 1-321.

(e) Answer of Garnishee

The garnishee shall file an answer within 30 days after service of the writ. The answer shall admit or deny that the garnishee is indebted to the judgment debtor or has possession of property of the judgment debtor and shall specify the amount and nature of any debt and describe any property. The garnishee may assert any defense that the garnishee may have to the garnishment, as

11, Issue 9 (Apr. 27, 1984).

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well as any defense that the judgment debtor could assert. After answering, the garnishee may pay any garnished indebtedness into court and may deliver to the sheriff any garnished property, which shall then be treated as if levied upon by the sheriff.

(f) When No Answer Filed

If the garnishee fails to file a timely answer, the judgment creditor may proceed pursuant to Rule 3-509 for a judgment by default against the garnishee.

(g) When Answer Filed

If the garnishee files a timely answer, the matters set forth in the answer shall be treated as established for the purpose of the garnishment proceeding unless the judgment creditor files a reply contesting the answer within 30 days after its filing. If a timely reply is not filed, the court may enter judgment upon request of the judgment creditor, the judgment debtor, or the garnishee. If a timely reply is filed to the answer of the garnishee, the matter shall proceed as if it were an original action between the judgment creditor as plaintiff and the garnishee as defendant and shall be governed by the rules applicable to civil actions.

(h) Interrogatories to Garnishee

The judgment creditor may file interrogatories directed to the garnishee pursuant to Rule 3-421. The interrogatories shall contain a notice to the garnishee that, unless answers are filed within 30 days after their service or within the time for filing an answer to the writ, whichever is later,

The new Maryland District Rules provide

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the garnishee may be held in contempt of court. If the garnishee fails to file timely answers to interrogatories, the court, upon motion of the judgment creditor and proof of service of the interrogatories, may enter an order in compliance with Rule P4 treating the failure to answer as a contempt and may require the garnishee to pay reasonable attorney's fees and costs.

(i) Release of Property; Claim by Third Person

Before entry of judgment, the judgment debtor may seek release of the garnished property in accordance with Rule 3-643, except that a motion under Rule 3-643(d) shall be filed within 30 days after service of the writ of garnishment on the garnishee. Before entry of judgment, a third person claimant of the garnished property may proceed in accordance with Rule 3-643(e).

(j) Judgment

A judgment against the garnishee shall be limited to the property of the judgment debtor established by the judgment creditor to be in the hands of the garnishee or to the amount owed under the creditor's judgment against the debtor and enforcement costs, whichever is less.

8/ Proposed Maryland District Rule 3-643, as adopted on April 6, 1984, added a subsection (f) which provides:

> "Hearing. - A party desiring a hearing on a motion filed pursuant to this Rule shall so request pursuant to Rule 3-311(d) and, if requested, a hearing shall be held promptly."

that the judgment debtor will be mailed a copy of the writ at his last known address by the party serving that writ on the garnishee. The writ shall contain notice to the judgment debtor that federal and state exemptions may be available, and of his right to contest the garnishment by filing a motion asserting a defense or objection. M.D.R. 3-645. A motion for exemption filed by the judgment debtor must be filed within thirty days of service of the writ. M.D.R. 3-643. Finally, the new rules provide that a party desiring a hearing on a filed motion must file a timely request within five days of service of the motion. M.D.R. 3-311(d).

V. The Due Process Claims

The plaintiffs assert that they have a property interest in their bank accounts, North Georgia Finishing. Inc. v. Di-Chem, 419 U.S. 601 (1975); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), which were

attached by the defendants under procedures set forth in former M.D.R. F1-F5. The defendants do not dispute the existence of the property interest. The issue is whether due process is provided by the Maryland District Rules as they now exist, and, if not, what process is due.

Almost sixty years ago, the Supreme Court addressed the issue of the process which is due in post judgment proceedings in Endicott Johnson Corp. v. Encyclopedia Press, Inc., 266 U.S. 285 (1924). The judgment creditor, Endicott Johnson, brought suit to compel the judgment debtor's employer, the Encyclopedia Press, Inc., to pay over 10% of the debtor's wages each week to the creditor pursuant to a duly awarded execution by the Supreme Court of New York. The employer asserted that the New York Code authorizing such garnishment violated the debtor's right of due process under the Fourteenth Amendment because the

execution was authorized without notice to the judgment debtor or without affording him an opportunity to be heard.

Justice Sanford, writing for the Court, upheld the ex parte application of the judgment creditor reasoning that,

> "in the absence of a statutory requirement, it is not essential that he [the debtor] be given notice before the issuance of an execution against his tangible property; after the judgment he must take 'notice of what will follow,' no further notice being necessary to advance justice."

Id. at 288.

Subsequent federal decisions applied the holding in Endicott Johnson and concluded that post garnishment statutes that did not provide notice to the debtor were constitutional and did not deprive the debtor of due process. See, e.g., Halpern v. Austin, 385 F. Supp. 1009 (N.D. Ga. 1974); Katz v. Ke Nam Kim, 379 F. Supp. 65, 68-69 (D. Haw. 1974); Langford v. State of Tennessee, 356 F. Supp.

1163 (W.D. Tenn. 1973) (per curiam); Moya v. DeBaca, 286 F. Supp. 606, 607-08 (D.N.M. 1968), appeal dismissed, 395 U.S. 825 (1969). See also Wanex v. Provident State Bank of Preston, 53 Md. App. 409 (1983) (per curiam) (citing Endicott Johnson with approval, but simply holding that the Maryland rules as then currently codified did not require notice to the debtor before garnishment).

The continuing applicability of Endicott Johnson to the more recent cases, which involve the garnishment of bank accounts which may contain exempt property, is questionable in light of the fact that the Court in Endicott Johnson did not consider any possibility that the judgment debtor might be deprived of exempt property. This issue, which does not arise until the judgment creditor seeks to subject specific assets of the judgment debtor to satisfaction of the judgment, cannot be resolved in the under-

lying action. Furthermore, the New York statute, which was upheld in Endicott Johnson, authorized garnishment of only ten percent of a judgment debtor's wages and only that percentage was sought by the judgment creditor. In contrast, the garnishment of bank accounts may deprive the judgment debtor of his sole source of income when retirement or welfare benefits are directly deposited into those accounts. See M. Greenfield, A Constitutional Limitation on the Enforcement of Judgments--Due Process and Exemptions, Wash. Univ. L. Q. 877, 887-88, 896-98 (1975).

Moreover, other courts have questioned the continuing validity of the Endicott Johnson holding in light of the Supreme Court's decision in Griffin v. Griffin, 327 U.S. 220 (1946). In Griffin, the plaintiff wife sought to enforce in the District of Columbia a 1938 New York judgment for support arrearages based on a 1926 New York alimony

decree. The 1938 judgment was obtained in an ex parte proceeding without notice to the husband. A 1936 judgment for arrearages, the court proceedings having been attended by the husband, was also unsatisfied. Id. at 223.

The Supreme Court held the 1938 judgment to be invalid to the extent it cut off any defenses the husband debtor might have raised with respect to arrearages accruing after 1936. The Court recognized the argument that the 1926 decree gave the husband notice that further proceedings might be taken which might result in a judgment on the obligation, but reasoned that there was "no ground for saying that due process does not require further notice of the time and place of such further proceedings, inasmuch as they undertook substantially to affect his rights in ways in which the 1926 decree did not." Id. at 229.

While this rationale conflicts with that

in Endicott Johnson, the fact that the Supreme Court did not refer in Griffin to that former decision has caused difficulty in determining what impact Griffin had. Courts have alternately refused to conclude that Griffin undercuts Endicott Johnson, Brown v. Liberty Loan Corp. of Duval, 539 F.2d 1355, 1363-65 (5th Cir. 1976), questioned the continuing validity of the Endicott Johnson decision, First Nat'l Bank v. Hasty, 410 F. Supp. 482, 489 n.8 (E.D. Mich. 1976); Betts v. Tom, 431 F. Supp. 1369, 1373 (D. Haw. 1977), or have noted the contradiction but not relied on it in reaching their decision. Phillips v. Robinson Jewelers, No. 81-190-BT (W.D. Okla., Feb. 15, 1982). In a later dissent on the dismissal of a writ of certiorari as improvidently granted, at least some of the justices on the Supreme Court indicated that they believed that the Endicott Johnson rationale was no longer viable in light of

Griffin. Hanner v. DeMarcus, 390 U.S. 736 (1968).9/

A series of recent Supreme Court cases concerning prejudgment deprivations reveal a shift in the Court's view of due process from that of the Court during the period when Endicott Johnson was decided. In 1969, the Supreme Court held unconstitutional in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), a Wisconsin prejudgment garnishment statute, which allowed a creditor to freeze the wages of a debtor in the hands of an employer pending the outcome of the action on the creditor's claim of indebtedness. The Court said that the garnishment of wages is such a severe deprivation that due process

9/ At least two early commentators on this subject suggest that Endicott Johnson may be questionable authority in light of Moya and Hanner. Countryman, The Bill of Rights & the Bill Collector, 15 Ariz. L. Rev. 521, 545 (1973); Levy, Attachment, Garnishment and Garnishment Execution: Some American Problems Considered in Light of the English Experience, 5 Conn. L. Rev. 399 (1973).

requires that it be preceded by notice to the debtor and an opportunity for a hearing. Id. at 340.

In Fuentes v. Shevin, 407 U.S. 67 (1972), the Supreme Court struck down Florida and Pennsylvania prejudgment replevin statutes which did not require advance showing by the applicants that the chattels in question were wrongfully detained. The Court concluded that the failure to provide the debtor with prior notice and an opportunity to dispute the creditor's claim deprived the debtor of due process in that "a hearing must take place when deprivation can still be prevented." Id. at 81.

In the third recent prejudgment case before the Court, Justice White, writing for the majority, after balancing the interests of the parties, concluded that a Louisiana sequestration statute, which failed to provide prior notice and a hearing, was consti-

tutional where other measures, such as a required creditor affidavit and the issuance of the writ by a judge, minimized the risk that the ex parte procedure would lead to a wrongful taking. Mitchell v. W. T. Grant & Co., 416 U.S. 600, 616-17 (1974).

In North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), Justice White, again writing for the majority, invalidated a Georgia prejudgment garnishment procedure which allowed the freezing of a corporation's bank account without either notice and a hearing before the freeze, or the alternate safeguards similar to those in Mitchell.

Following the prejudgment deprivation cases, the Supreme Court reviewed the concept of due process in an analogous context. In Mathews v. Eldridge, 424 U.S. 319 (1976), when examining the process due a Social Security recipient prior to termination of

her benefits, the Court observed that its former cases, including Di-Chem, Snaidach, and Fuentes,

> "'underscore the truism that 'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). 'Due Process is flexible and calls for such procedural protections as the particular situation demands.' Morrissey v. Brewer, 408 U.S. 471, 481 (1972). . . . Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. Arnett v. Kennedy, supra, [416 U.S. 134], at 167-168 (Powell, J., concurring in part); Goldberg v. Kelly, [367 U.S. 254], supra, at 263-266; Cafeteria Workers v. McElroy, supra, [397 U.S.], at 895. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors; first, the private interest that will be affected by the official actions; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e.g., Goldberg v. Kelly, supra, [367 U.S.] at

263-271."

Mathews, at 334-35.

In contrast to the categorical analysis of Endicott Johnson, the balancing of interest approach to due process, first recognized in the creditor-debtor situation in Mitchell, and distilled in Mathews, has been applied by courts and commentators[10/]

10/ See Note, Due Process, Postjudgment Garnishment, and "Brutal- Need" Exemptions, Duke L.J. 192 (1982); Greenfield, A Constitutional Limitation on the Enforcement of Judgments--Due Process and Exemptions, 1975 Wash. U.L.Q. 877; Note, Due Process Requires Notice of Exemptions and a Prompt Post-seizure Hearing for Postjudgment Garnishment, 46 Mo. L. Rev. 857 (1981); Note, Pennsylvania's Postjudgment Garnishment Procedures Violate The Due Process and Supremacy Clauses, 26 Vill. L. Rev. 579 (1980-81); Comment, Postjudgment Wage Garnishment Procedure that Gives Debtor No Notice or Opportunity to Assert Statutory Exemption Prior to Garnishment is Unconstitutional, 3 Fla.St.U. L. Rev. 626 (1975); Alderman, Default Judgments & Postjudgment Remedies Meet the Constitution: Effectuating Sniadach and Its Progeny, 65 Geo. L.J. 1 (1976); Dunham, Post Judgment Seizures: Does Due Process Require Notice and Hearing, 21 S.D. L. Rev. 79 (1976); Note, A Due Process Analysis of New York's Postjudgment Garnishment Procedure, 44 Alb. L. Rev. 849 (1980).

analyzing post judgment garnishment and execution procedures. See Finberg v. Sullivan, 634 F.2d 50 (3d Cir. 1980) (en banc); Brown v. Liberty Loan Corp. of Duval, 539 F.2d 1355 (5th Cir. 1976), cert. denied, 430 U.S. 949 (1977); Deary v. Guardian Loan Co., Inc., 534 F. Supp. 1178 (S.D.N.Y. 1982); Betts v. Tom, 431 F.Supp. 1369 (D. Haw. 1977); First Nat'l Bank v. Hasty, 410 F.Supp. 482 (E.D. Mi. 1976); Harris v. Bailey, 574 F.Supp. 966 (W.D. Va. 1983); Phillips v. Robinson Jewelers, No. 81-190-BT (W.D. Okla., Feb. 16, 1982); Simler v. Jennings. 23 0. Op. 3d 554 (S.D. Ohio 1982).

In Finberg, 634 F.2d 50, the Third Circuit concluded that the Pennsylvania restraint and enforcement procedures, which resulted in freezing the plaintiff's bank account, failed to provide notice and a prompt post seizure hearing, denied the judgment debtor due process of law, and violated

the Supremacy Clause of the United States Constitution. Id. at 59-63. Notice was insufficient because it failed to inform the judgment debtor of the exemptions which might have been available or the procedures by which to assert an exemption. A prompt hearing was not available where the creditor had fifteen days to respond to an exemption petition before the debtor could request a hearing.11/

11/ Similarly, in Deary v. Guardian Loan Co., Inc., 534 F. Supp. 1178 (S.D.N.Y. 1982), the district court held that the failure to afford judgment debtors notice of and an opportunity to challenge New York's postjudgment enforcement procedures violated both due process and the Supremacy Clause, even though the enforcement procedures did include postseizure means for asserting exemptions. In particular, the Deary court required that the debtors be apprised of the exemptions available to them and the procedures by which such a claim could be asserted. Id. at 1187-88. Compare Cole v. Goldberger, Pederson & Hochron, 410 N.Y.S.2d 950 (Sup. Ct., Broome City 1978) (holding New York enforcement procedures unconstitutional because of a lack of notice) with Warren v. Delaney, No. 1155318 (N.Y.Sup.Ct., Westchester Cty., June 11, 1981) (holding New York procedures constitutional on the basis of Endicott Johnson.

By contrast, in Brown, 539 F.2d 1355, the

In Betts v. Tom, 431 F. Supp. 1369 (D. Haw. 1977), the judgment creditor of the plaintiff had a garnishment summons issued to a local bank where the plaintiff maintained an account. The sole funds in the plaintiff's account were Hawaiian state welfare funds, exempt under Hawaiian law. The bank froze the plaintiff's funds for four weeks when she was successful in quashing the writ of garnishment. The Hawaii statute requires no affidavit from the judgment creditor that the property to be garnished is nonexempt and the writ will be furnished by the clerk of the court after a form is filled in by the judgment creditor. The court found that Haw. Rev. Stat. Section 652-1(b) was unconstitutional insofar as it allowed the issuance of ex parte writs of garnishment to be served on personal checking accounts belonging to judgment debtors which may or do contain funds traceable to AFDC benefits. Although the court limited its holding to the facts before it, it required that the statute henceforth incorporate a procedure similar to that in Mitchell, 416 U.S. 600, and Fuentes, 407 U.S. 67, of the presentation of an affidavit setting forth facts that the funds to be garnished are not exempt funds, to be reviewed by a judicial officer, and the entitlement of notice and a quick, two working days' review of any AFDC exemption claim.

In Simler v. Jennings, 23 O. Op. 3d 554 (S.D. Ohio 1982), a magistrate, pursuant to 28 U.S.C. § 636(b)(4) and (c)(1) held Ohio's postjudgment garnishment procedure unconstitutional. The Ohio Law set out a single system of postjudgment garnishment for the

Fifth Circuit, after balancing the interests

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various types of garnishments available to judgment creditors. A garnishment action was commenced by filing an affidavit in which it is stated that the creditor does not believe that the property sought to be attached was exempt. The order is served on the garnishee who is directed to deliver a copy to the debtor. No hearing either before or after the seizure is required. An ad hoc hearing will be provided upon request by the debtor after an answer time of 21 days is given the judgment creditor. The notice received by the debtor concerns only the actions to be taken by the garnishee, with no language informing the debtor that he may challenge the garnishment or of the possible defenses. Consequently, the court ordered that future procedures should provide, at a minimum, notice of the garnishment on the debtor, a notice explaining the defenses, a description of the procedure for asserting those defenses, and a prompt disposition of the issues.

In Phillips v. Robinson, Inc., No. Civ.-81-190-BT (W.D. Okla. 1983), the District Court held that Oklahoma's postjudgment garnishment statutes were unconstitutional in that notice of the garnishment proceedings was not served on the debtor, did not inform the debtor of the particular grounds or procedures for challenging the garnishment actions, and no prompt hearing was provided.

In Harris v. Bailey, 574 F.Supp. 966 (W.D. Va. 1983), the plaintiff Harris, a Social Security recipient, filed an action seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 to invalidate the postjudgment garnishment procedures per-

of the parties, concluded that a Florida post judgment wage garnishment statute, which did not provide for prior notice or a hearing, satisfied due process. This decision was reached in part because the plaintiff was provided with an expeditious review of his claim.12/

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mitted by Va. Code §§ 8.01-511 to 525 (1977 & Supp. 1983) as violative of the Due Process and Supremacy Clauses of the United States Constitution. After an appeal in which the Fourth Circuit held that there was a justifiable controversy despite the fact that her garnished benefits had been returned to her, the District Court on remand held that the Virginia postjudgment garnishment procedures were constitutionally deficient in that the statute provided no requirement that the notice to the judgment debtor be served in a timely manner, there was no notice of the possible exemptions available to the judgment debtor or the process for contesting the garnishment, and finally, there was no requirement of an expeditious hearing.

12/ Similar to Brown, in First Nat'l Bank v. Hasty, 410 F. Supp. 482 (1976), where the defendant judgment debtor failed to demonstrate that his notice of proceedings from the garnishee defendant in accordance with the Michigan Rule had been inadequate or impaired his ability to object, there was no deprivation of due process. Judgment debtor's rights of due process were further

A. Identification of the Interests Involved and Risk of Erroneous Deprivation

The post judgment creditor has a strong interest in prompt and inexpensive satisfaction of the debt owed by the judgment debtor. Deary, 534 F. Supp. at 1186. More weight is to be accorded this interest in a post judgment context than in prejudgment situations, because there is no question as to the debtor's liability. Delay or added expense to the creditor will only diminish the ultimate value of the recovery on the debt. Finberg, 634 F.2d at 58; Brown, 539 F.2d at 1365; Betts, 431 F. Supp. at 1376. The ability to seize swiftly monetary assets, such as bank accounts, which are easily liquidated, is in

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protected by the Michigan requirement that before any writ of garnishment is issued an affidavit must be presented to the clerk of the court showing that the plaintiff is justly apprehensive of loss unless the writ is issued. The court did not consider the question of whether the notice must inform the debtor of the procedures or the defenses available to him, or the question of the timing of the hearing to be provided to him.

the creditor's interest since it is faster and less expensive than enforcement against other types of personal property. Finberg, 634 F.2d at 58; Brown, 539 F.2d at 1366; Deary, 534 F. Supp. at 1186. The creditor's fear that liquid assets held in bank accounts can quickly disappear if notice is given is real and further suggests the need for the ability to attach these funds without advance notice to the judgment debtor. Phillips, slip op. at 13 (Paper No. 22, Exh. A).

The debtor's interest in the uninterrupted use of his bank accounts is not insubstantial.

> "A bank account may well contain the money that a person needs for food, shelter, health care, and other basic requirements of life."

Finberg, 634 F.2d at 58. Freezing a bank account may deprive a debtor of all his income when those funds represent the total monthly benefits of the disabled, the elderly or the mother with dependent children. In

contrast to situations involving the garnishment of wages where, as in Brown, a statute usually imposes a limit on the portion of the wages which may be frozen and obtained, the garnishment of a debtor's bank account, which may contain most of his money, can be catastrophic. The attachment of bank accounts, therefore, increases the probability that the judgment creditor may deprive debtors of all means for providing for themselves. The legitimacy of the debtor's need for at least a portion of the funds in these accounts is underscored by the legislatures' determinations that an exemption is necessary to safeguard the debtor's ability to purchase the basic necessities. Finberg, 634 F.2d at 58; Deary, 534 F. Supp. at 1186; Betts, 431 F.Supp. at 1375.

For the most part, the interests of the government coincide with the interests of the debtor and the creditor. The government's

interests include insuring the enforcement of judgments and the use of efficient procedures to do so, maintenance of the integrity of the judicial process by preventing asset dissipation which would frustrate judicial decisions, and the provision to judgment debtors of the means to subsist and to obtain the basic necessities of life. In addition, the government's concern with minimizing the burden on its courts and other agencies must also be considered.

In the present case, the interests of the judgment creditors and judgment debtors are those recognized by courts which have previously examined these issues. The American Express Company, the C & P Telephone Company, and the Equitable Bank all had an interest in recovering efficiently and quickly the debt owed them by the judgment debtors. The plaintiffs had their sole sources of income placed beyond their reach for the period of

time between the issuance of the writ until their claims of exemptions were resolved by the district courts. Plaintiff Dannie, a mother of three, had her sole source of income, AFDC benefits, deposited directly in her bank account, frozen. Plaintiff Reigh had her pension and Social Security retirement benefits, directly deposited in her bank account, frozen. The Simpkins had their disability and dependent's disability funds from Social Security frozen. Each plaintiff, relying solely for sustenance on benefits which are statutorily exempt from garnishment, was deprived of those benefits until the district courts ruled on the respective motions to quash.

B. Notice

The Maryland District Rules in effect when this suit was filed and as amended on October 21, 1983 contained no assurance that the judgment debtor would ever

receive notice that his bank account had been attached and the funds therein frozen. M.D.R. F1 provided for service of the writ only on the garnishee, not on the debtor. While the back of the Order for Attachment, which was served on the garnishees holding the property of these plaintiffs, stated that the garnishee should notify the debtor, there was no requirement that the garnishee do so (Paper No. 13, Dannie Affidavit, Order for Attachment attached thereto; Paper No. 15, Reigh Affidavit, Order of Attachment attached thereto).

At the December 2, 1983 hearing, the defendants submitted to the court for its consideration copies of two types of forms then being used by the District Courts of Maryland in post judgment garnishment cases.[13/] Defendants' Hearing Exhibit No. 2

13/ At the hearing, the defendants also submitted a copy of the constable's manual, printed by the District Courts of Maryland.

is the Petition for Attachment on Judgment containing also the Writ of Attachment (hereinafter referred to as Petition/Writ). This Petition/Writ replaced the Order for Attachment form used by the Maryland District Courts to notify the garnishees of the plaintiffs' property. The Petition/Writ was printed in June of 1983. Although the new Petititon/Writ stated that the debtor may claim a cumulative $3,000 exemption of any judgment as set forth in Md. Cts. & Jud. Proc. Code Ann. § 11-504, the Petition/Writ no longer informed the garnishee that it should mail a copy of the order to the debtor. Thus, there was still no requirement by

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(Defendants' Exhibit No. 3). This manual was in effect at the time the plaintiffs in this case had their accounts frozen. Although the manual § 2.33 states that the sheriff must notify the judgment debtor that a writ has been served on his property held by a third person, this was not done for any of the plaintiffs in this case; as the manual is not strictly followed, it does not provide the judgment debtors with the due process rights they should have been provided by law.

statute or rule nor any longer a suggestion in the forms used that the garnishee inform the judgment debtor of the attachment of his or her bank account, in order to provide the judgment debtor with notice of his right to assert a claim of exemption.

Defendants' Hearing Exhibit No. 1 is a copy of the Garnishee's Confession of Assets form. This form is completed by the garnishee and it indicates the property of the judgment debtor that is held by the garnishee. Once a Confession of Assets was filed by the garnishee, the district court could enter a judgment of condemnation absolute for the assets confessed, provided that no claimant filed a pleading within thirty days after service of the writ on the garnishee. M.D.R. F4. This form, which went into use in September, 1983, contains on it a certification, to be completed by the garnishee, that a copy of the confession of assets form

has been mailed to, among others, the defendant, judgment-debtor. The reverse side of the confession of assets form lists those items which are exempt from execution on judgment as provided for in Md. Cts. & Jud. Proc. Code Ann. § 11-504(b) & (c), and informs the judgment debtor that if he or she wishes to claim the $3,000 exemption set forth in § 11-504(b)(5), the judgment debtor may fill out and return a Motion to Elect Exemption form set forth below.

While the new M.D.R. 3-645(d) seems to require that the answer of the garnishee be served on the judgment debtor as well as the creditor, there is no requirement in the post judgment garnishment rules that a copy be received by the debtor or filed by the garnishee within the thirty-day period the judgment debtor has to assert his claim of exemptions. M.D.R. 3-645(e) and (i). With the old form, which also contained a certificate

of service to the judgment debtor, (Paper No. 13, Simpkins Affidavit, Garnishee's Confession of Assets form), the Simpkins did not receive a copy of the Confession of Assets form until almost three weeks after their bank account had been frozen and the writ had been served. Thus, the possibility exists that judgment debtors will not receive a copy of the Confession of Assets form until after their time to file their defenses to the attachment has run.

Although, as the plaintiffs rightly pointed out, the law prior to July 1, 1984 did not require that the judgment debtor be given notice of anything, the new M.D.R. 3-645(d) requires that the judgment debtors be mailed a copy of the writ "[p]romptly after service upon the garnishee."

The old procedure, under the rules as they existed when this suit was filed, and as the rules were amended on October 21, 1983,

was a violation of due process in that a judgment debtor was not guaranteed notice of an attachment sufficient to allow him to obtain a meaningful judicial determination of his right to an exemption of property under state and federal law.

The new rule, however, appears to the court to provide for the timing of notice to the judgment debtor in a manner sufficient to satisfy the concepts of fairness inherent in the Due Process Clause. While the timing of the notice under the new M.D.R. 3-645(d) is somewhat ambiguous in that it is required "promptly" after service upon the garnishee, this court is reluctant to conclude, in the absence of state court rulings on the meaning of that term in this context, that the notice would be deemed to be "prompt" if not sent at the first possible opportunity after service upon the garnishee was achieved. Only if the notice is sent immediately to the judgment

debtor after service upon the garnishee will the debtor have a reasonable opportunity to take action to obtain a meaningful judicial determination[14/] of his rights to an exemption of the seized property.

C. Content of Notice

The second result of a lack of notice from the District Courts of Maryland to the debtors, alleged by the plaintiffs, is the likelihood of ignorance on the part of judgment debtors of the exemptions which are available[15/] and the process by which a claim

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14/ Professor Alderman has argued that all postjudgment summary-seizure procedures should provide for notice and an opportunity to be heard before any deprivation occurs. Alderman, 65 Geo. L. J. at 23. As Mitchell reveals that such protections are not necessarily required in a prejudgment attachment process, this court does not believe that in a postjudgment context there is an absolute need for resolution of the claim of exemption before the initial attachment where other protections assure that the risk of a wrongful deprivation will be slight and any wrongful deprivation will be brief.

15/ A partial listing of federal and Maryland exemptions available to judgment

of exemption can be made.

The notice requirement by due process must be "reasonably calculated, under all the circumstances, to . . . afford [interested parties] an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Green v. Lindsey, 456 U.S. 444 (1982). See Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13-15 (1978) (public utilities notice to its

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debtors is identified by the plaintiffs in Paper No. 14, Exh. B. The benefits received by the plaintiffs in this case were exempt under 42 U.S.C. § 407 (exempts the payment of benefits available under the Social Security Act (Reigh and Simpkins), 29 U.S.C. § 1056(d)(1) (exempts ERISA pensions) (Reigh), Md. Cts. & Jud. Proc. Code Ann. §§ 11-504 (general exemption for a certain amount of cash) (Reigh and Simpkins), and Md. Ann. Code, Art. 88A, § 73 (exempts all benefits available under state public assistance programs).

A further examination of the exemptions available to debtors is set forth in two articles. See Vukovich, Debtor's Exemption Rights, 62 Geo. L. J. 779, 797-832 (1974); Glenn, Property Exempt from Creditor's Rights of Realization, 26 Va. L. Rev. 127, 128 (1939).

customers of the termination of their gas and electric services failed to satisfy due process because the notices did not inform the customers of the process for contesting terminations); Banks v. Trainor, 525 F.2d 837 (7th Cir. 1975), cert. denied, 424 U.S. 978 (1976) (because notices did not inform recipients of factors relevant in determining net food stamp income, the plaintiff class could not inform caseworker of expenditures properly considered); Holbrook v. Pitt, 643 F.2d 1261, 1281 (7th Cir. 1981) (notice to housing project tenants of their right to receive retroactive housing benefits required); Nunez v. Boldin, 537 F. Supp. 578 (S.D. Tex. 1982) (notice of the opportunity to apply for asylum must be given). See also Hanner, 390 U.S. at 741 (and cases cited therein); Nelson v. Regan, 560 F. Supp. 1101 (D. Conn. 1983); Hill v. O'Bannon, 554 F. Supp. 190, 195 (E.D. Pa. 1982).

In Finberg, the Third Circuit reasoned that providing notice to the debtors of the exemptions available would "provide substantial protection to the debtor's interest in having funds available for basic necessities." Finberg, 634 F.2d at 62. Since knowledge of the exemptions is not widespread and the debtor's inability to consult an attorney before the freeze could cause serious problems, the court concluded that the balance of interests required that the debtor be furnished with this information and that failure to provide such information was a violation of due process. Id. at 62. Accord Deary, 534 F. Supp. at 1187.

"The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" Craft, 436 U.S. at 14. Notice in a case such as this, where an individual's ability to obtain basic

necessities is endangered, does not comport with due process when it does not advise the debtor of the procedure for protesting the attachment of his bank accounts or the grounds on which such an attachment could be challenged. Such information can be incorporated into the writ of attachment form from the district court with little burden on the courts.

This information is not required to be supplied by the new rules nor is it, in fact, presently supplied, the court having already determined that the Confession of Assets form to be sent to the debtor by the garnishee affords notice of only one type of exemption without a full explanation of how to obtain a hearing.

The Maryland District Rules presently, as they have in the past, deprive judgment debtors of their constitutional rights of due process as a result of the deficiency in the

required content of the notice.

D. Opportunity for a Timely Hearing

The third defect in the Maryland District Rules, which the plaintiffs allege existed and continues to exist, is the absence of an opportunity for a timely hearing. The plaintiffs seek to have this court determine that a hearing on the judgment debtor's motion to assert an exemption must be held within a finite number of days, a time period which will not deprive the judgment debtor of his exempt property for longer than is absolutely necessary.

The defendants contend that hearings were held on such motions in an expeditious manner under the law as it existed when this suit was filed and as the rules were amended on October 21, 1983. Rule G51, which used to require that a hearing be held on a motion to quash "forthwith," was amended on October 21, 1983 to provide that when a debtor files a

motion to release property and then requests a hearing, the district court shall hold a hearing "promptly." M.D.R. G51. The new rules contain the provision that a hearing, if requested, shall be held "promptly." M.D.R. 3-643(f). The new rules do not require that a claim for exemption, if no hearing is requested, be ruled upon "promptly" or at any particular time.

The court in Phillips required that the hearing on the exemption application be held within ten days or less. In Betts, the hearing was required to take place in two working days. In Finberg, the court held that fifteen days' delay in holding a hearing was too long. In Deary and Simler, it was held that a hearing was required to be held as soon as possible so as not to deprive the judgment debtor of funds for longer than was necessary.

As noted earlier, the probability that an

erroneous deprivation will occur when a judgment debtor's entire bank account is garnished is high, and the debtor's interest in the continued use of these funds is self-evident. Just as the withholding of utility services of water and electricity may threaten health and safety, Craft, 436 U.S. at 18, so too will the withholding of funds necessary to pay for those services and the additional basic necessities of shelter, food, and medicine. A hearing resolving the judgment debtor's claim of exemption must be quickly provided to limit the period an individual judgment debtor can be restrained from using the frozen funds, attached by an order of court. As all the courts examining this question have concluded, a prompt judicial hearing on this question in these circumstances is one which will take place within two weeks or less from the time the claim of exemption is filed. A delay longer than that

period could seriously threaten the health and safety of the judgment debtor and those who depend on him for support.

While the Maryland District Rules now provide that the hearing, when requested, be held promptly, the Maryland District Rules provided that motions be heard "forthwith" when the plaintiffs in this suit filed their motions in which they asserted their claims of exemption. Under the "forthwith" standard, arguably a more demanding standard than "promptly," the claim of plaintiff Dannie was resolved in twelve days, the claim of plaintiff Reigh was resolved in two weeks, and the claim of the Simpkins was resolved in one month. As illustrated by the facts relating to the cases of these particular plaintiffs, a rule which does not provide a particular period of time within which the motion asserting an exemption must be heard is too easily abused and provides the opportunity

for constitutional deprivation.

As demonstrated by the reasoning of this court and others which have considered the meaning of "reasonableness" in the context of a claimed exemption by judgment debtors, a reasonable period of time in these circumstances is a short one.16/ Accordingly, this

16/ In response to this court's request, the defendants have provided the court with the number of these types of writs filed during a year, as well as the number of claims of exemptions filed. The defendants have advised the court that for the period July 1982 to June 1983, there were 5,962 writs served on area financial institutions. For the period July 1 through September 19, 1983, there have been 2,703 Writs of Garnishment served. The statistics of the District Court further reflect that claims of exemption average only three or four per month. (Paper No. 29).

In considering the period of time in which the claims of exemptions must be resolved by the District Courts of Maryland, the court has considered these figures. Noting also that there are 84 District Court Judges throughout the State of Maryland, (Maryland Lawyers Manual, Vol. XVI, 1983), even if all the judgment debtors on whose accounts writs were served in the period July 1982 to June 1983 had filed claims of exemptions, each judge would have had approximately 71 claims to resolve during that

court concludes that when a hearing is requested in Maryland post judgment garnishment proceedings, that hearing must take place within two weeks of that request. If a hearing is not requested by any of the parties, then the claim of exemption must be resolved within two weeks of the date of its filing.

In the present case, the delay in adjudicating plaintiffs Simpkins' claim of exemption unconstitutionally deprived the Simpkins of their right to due process under the Fourteenth Amendment to the United States Constitution. Because the process due to judgment debtors, particularly the period of time within which the hearing on a claim of exemp-

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year. While the court is aware that the claims will not be spread evenly throughout all the District Court judges in Maryland, and the end of the present year may present an increase in the number of writs served, the burden imposed by a finite time period is not unbearable, even assuming that a claim of exemption is filed in every instance that a writ is served.

tion is required to be held, was not firmly established in this district at the time the Simpkins filed their exemption claim, this court concludes that the Clerk of the Court of Howard County is immune from any claim of damages by the Simpkins. Harlow v. Fitzgerald, 457 U.S. 800 (1982).[17/]

For the reasons stated above,[18/] it is this 29th day of October, 1984, by the United

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17/ Officials will be held liable where they could be expected to know that certain conduct would violate statutory or constitutional rights. Harlow, 457 U.S. at 819. "Because they [the District Court Clerks] could not reasonably have been expected to be aware of a constitutional right that had not yet been declared, petitioners did not act with such disregard for the established law that their conduct 'cannot reasonably be characterized as being in good faith.'" Procunier v. Navarette, 434 U.S. 555, 565 (1978), quoting Wood v. Strickland, 420 U.S. 308, 322 (1975).

18/ The disposition of the due process claims makes it unnecessary to resolve the issue of whether the Maryland District Court Rules violate the Supremacy Clause of the United States Constitution by allowing summary attachment of property exempt under federal law.

States District Court for the District of Maryland, ORDERED:

1. That the Motion to Dismiss filed by the defendants be, and the same is hereby, DENIED.

2. That the Motion for Summary Judgment filed by the defendants be, and the same is hereby, DENIED.

3. That the Motion for Summary Judgment filed by the plaintiffs be, and the same is hereby, GRANTED.

4. That the Maryland District Rules regarding post judgment garnishment procedure be, and the same are hereby, DECLARED to be unconstitutional in that they do not provide for adequate notice to a judgment debtor of the claims of exemption which are available, nor do they assure resolution of a claim of exemption within a reasonable time.

5. That a permanent injunction restraining the Clerks of the Maryland District

Courts from issuing said writs of attachment without the above-required notice will be entered in a form to be determined at a later date. Counsel are directed to confer immediately and furnish to this court within ten (10) days an agreed form of injunction.

6. That the Clerk of this Court shall mail a copy of this Memorandum and Order to counsel for the defendants and counsel for the plaintiffs.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ESTHER V. REIGH, et al. :

v. : CIVIL ACTION
NO. M-83-245

CHARLES L. SCHLEIGH, et al. :

PERMANENT INJUNCTION AND FINAL ORDER

For the reasons stated in the Court's Memorandum and Order in this matter issued on October 29, 1984, it is this 27th day of November, 1984, by the United States District Court for the District of Maryland, hereby ORDERED, ADJUDGED and DECREED:

1. The Maryland District Court Rules regarding post garnishment fail to provide for adequate notice to a judgment debtor of the claims of exemption which are available and fail to assure hearing of a claim for exemption within a reasonable time and so violate the Due Process Clause of the United States Constitution;

2. The Clerks of the Maryland District Courts are permanently enjoined from issuing Writs of Garnishment of Property Other Than Wages pursuant to Maryland Rule 3-645 until such time as: (a) the Writs of Garnishment of Property Other Than Wages include a notice which advises the debtor of the procedure for protesting the attachment of his bank accounts and the grounds on which such an attachment could be challenged; the form of notice which is attached hereto has been approved by the parties and is found to comply with this requirement; and (b) by amendment to the Maryland District Court Rules or by administrative directive, the Maryland District Courts are required to hear, if requested, any Claim of Exemption or Motion to Quash or, if a hearing is not requested, to decide any such Claim or Motion, within fourteen (14) days of the date of its filing; and

3. Until such time as the changes referred to in paragraph 2 above are made: (a) the Clerks of the District Courts of the State of Maryland shall not issue any Writs of Garnishment of Property Other Than Wages; (b) the District Courts of the State of Maryland, in cases in which Writs of Garnishment of Property Other Than Wages were issued and served before October 29, 1984 and in which cases Claims of Exemption or Motions to Quash have been or will be filed, shall hear, if requested, said Motions or Claims of Exemption or, if a hearing is not requested, to decide such Claims or Motions, within fourteen (14) days of the date of the filing of the Motions to Quash or Claims of Exemption; (c) in those cases in which Writs of Garnishment of Property Other Than Wages have been issued or served on or after October 29, 1984, the District Courts, upon receiving returns from the sheriff that the garnishee

has been served, shall, on the date of receipt of the return from the sheriff, orally inform the garnishee, that the Writ of Garnishment is not to be enforced and any property already attached by way of the Writ of Garnishment shall be freed and available for use by the Judgment Debtor and on that same day send written confirmation to that effect tc the Garnishee and shall send a copy of that notice to the Judgment Debtor and Judgment Creditor, until further Order of this Court.

SO ORDERED, this 27th day of November, 1984 at 4:49 p.m.

James R. Miller, Jr.
United States District
Court Judge

NOTICE TO JUDGMENT DEBTOR
CONCERNING EXEMPTIONS

As a result of the judgment entered against you, the bank or other person holding your money or property has been ordered by this court to hold your money or property subject to further order of the court. You may be entitled to claim an exemption of all or part of your money or property, but in order to do so you must file a motion with the court as soon as possible. If you do not file a motion within 30 days of when the Garnishee was served, your property may be turned over to the Judgment Creditor. You may include in your motion a request for a hearing. If you file a motion claiming an exemption, the court will hear or decide your claim for exemption within 14 days of the time you file the motion.

You have the right under Maryland law to claim an exemption of certain kinds of per-

sonal property such as wearing apparel, books, tools, instruments or appliances necessary for the practice of any trade or profession except those kept for sale, lease or barter; money payable in the event of sickness, accident, injury or death of any person including compensation for loss of future earnings (however, disability income benefits are not exempt if the judgment is for necessities contracted for after the disability is incurred); professionally prescribed health aid for the debtor or dependent of the debtor; debtor's interest, not to exceed $500 in value, in household furnishings; household goods, wearing apparel, appliances,books, animals kept as pets, and other items that are held primarily for the personal, family or household use of the debtor or any dependent of the debtor. IN ADDITION, WITHIN THIRTY DAYS AFTER THE DATE OF SERVICE OF THE WRIT OF GARNISHMENT ON

THE BANK OR OTHER PERSON HOLDING YOUR MONEY OR PROPERTY, YOU MAY ELECT TO EXEMPT A TOTAL OF $3,000 IN MONEY OR PROPERTY OR A COMBINATION OF MONEY AND PROPERTY.

(This exemption does not apply to an Attachment Before Judgment.)

You may be entitled to claim an exemption under Maryland law of certain money such as: benefits under state public assistance programs; employee pensions; teacher's retirement pensions; unemployment insurance benefits; worker's compensation; pension benefits for state police; benefits from a fraternal benefit society; and proceeds from life insurance or annuity contracts.

Also, you may be entitled to claim an exemption under federal law of certain money such as: Social Security disability benefits; Supplemental Security Income benefits; annuity payments based on retired or retainer pay from the Armed Forces; Civil Service

retirement and disability funds; annuities to widows and surviving dependent children of judges; federal worker's compensation; and federal retirement pensions.

YOU MAY ALSO BE ENTITLED TO PROTECT OTHER MONEY OR PROPERTY NOT MENTIONED ABOVE.

TO PROTECT YOUR RIGHTS FULLY, IT IS IMPORTANT THAT YOU ACT PROMPTLY. IF YOU HAVE ANY QUESTIONS, YOU SHOULD CONSULT A LAWYER.

ORIGINAL

No. 87-1102

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1987

CHARLES L. SCHLEIGH, In his official capacity as principal clerk of the District Court for Washington County, and NANCY MUELLER, in her official capacity as clerk of the District Court for Howard County, and WILLIAM A. DORSEY, in his official capacity as administrative clerk of the District Court of Baltimore City,

Petitioners

versus

ESTHER V. REIGH and IVERY MAE SIMPKINS and LENORA C. DANNIE,

Respondents

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Elizabeth A. Renuart
Legal Aid Bureau, Inc.
P. O. Box 695
Frederick, Maryland 21701
(301) 694-7414

Counsel of Record for
Respondents

COUNTERSTATEMENT OF QUESTION PRESENTED

Does the Civil Rights Attorney's Fees Act, 42 U.S.C. §1988, authorize the award of attorney's fees to a plaintiff who caused the defendant's behavior to change in an enduring way even though judgment on the merits was entered in favor of the defendant?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIOINAL PROVISIONS, STATUTES AND RULES

LEGISLATIVE HISTORY

COUNTERSTATEMENT OF THE CASE

In January, 1983, the Respondents filed this action pursuant to 42 U.S.C. §1983 seeking declaratory and injunctive relief against the clerks of the state district courts for the three counties in which the Respondents resided. The Respondents maintained that the Maryland district court rules in effect at that time permitted bank accounts containing only exempt funds to be summarily attached without providing them with timely and adequate notice and an opportunity for a timely hearing. The Respondents contended that the clerks, by issuing orders for attachments of exempt funds under color of state law, denied them due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. They further contended that these actions violated the supremacy clause of the United States Constitution. The Respondents alleged that the actions of the clerks caused them irreparable injury by depriving them of their exempt assets for a significant period of time.

The rules of procedure in question at that time did not provide that any notice whatsoever of the attachment be served on the judgment debtor. M.D.R. G47; App. at 102a.[1] If a judgment debtor happened to contest the attachment by filing a motion, a hearing was to be held "forthwith" whether or not one had been requested. M.D.R. G51; App. at 102a.

These particular rules of procedure remained in effect throughout the course of the lawsuit until July 1,

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[1] All citations to the Appendix refer to the Petitioner's Appendix.

1984 when amendments to them became effective. [2] This was approximately four months before the District Court made its decision on the merits. The amended rules were an improvement to the original rules. [3] Respondents contended before the District Court that these revisions, though an improvement, violated the due process clause by not requiring that the notice served upon the judgment debtor contain specific information regarding the most common exemptions and the procedures available to obtain a release of the property, and by not requiring that a hearing be held or decision made on a motion to release the attached property within a specified period of time.

On October 29, 1984, the District Court found the original and the amended rules to be unconstitutional and agreed with claims of the Plaintiffs. Reigh v. Schleigh, 595 F.Supp 1535, 1554-1557 (D. Md. 1984); App. at 149a-150a, 155a-156a, 160a-161a. [4]

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[2]The Maryland Court of Appeals has the ultimate authority to make changes in the state rules of procedure. Md. Cts. & Jud. Proc. Code Ann. §1-201. Amendments are suggested to that Court by the Maryland Court of Appeals Standing Committee on Rules of Practice and Procedure (hereafter referred to as the "Rules Committee").

[3]They require that a copy of the writ of garnishment be mailed to the judgment debtor "promptly" after service upon the garnishee. Md. Rule 3-645(d); App. at 119a-120a. The writ must also notify the judgment debtor and garnishee that federal and state exemptions may be available and notify the judgment debtor of the right to contest the garnishment by filing a motion asserting a defense or objection. Id. If a judgment debtor files a motion to quash and requests a hearing, the hearing must be held "promptly". Md. Rules 3-645(i); 3-643(b); App. at 122a, 118a. If a hearing is not requested upon such a motion, there is no rule specifying when a court must decide a motion to quash. Md. Rules 3-643(d); 3-311(d); App. at 118a, 116a.

[4]The trial and appellate court decisions on the merits will be referred to as Reigh I. The trial and appellate court decisions on the attorney's fees issue will be referred to as Reigh II.

The clerks appealed that portion of the decision which declared that the amended rules were unconstitutional. They did not appeal the finding that the original rules were unconstitutional. The Fourth Circuit vacated and remanded holding that the amended rule regarding the provision of notice as to the availability of exemptions was constitutional. Reigh v. Schleigh, 784 F.2d 1191, 1196 (4th Cir. 1986) cert. denied, 107 S. Ct. 167 (1986); App. at 57a. With respect to the "prompt" hearing requirement, the Fourth Circuit held that, based upon the record before it, there was insufficient evidence of extended delay and therefore the standard was adequate. Reigh I, 595 F.Supp. at 1199; App. at 67a.

Following remand, the District Court, upon motion, awarded the Respondents a limited amount of attorney's fees because they "prevailed to a limited extent." App. at 30a. [5] On appeal, the Fourth Circuit affirmed. Reigh v. Schleigh, 829 F.2d 1334 (4th Cir. 1987); App. at 1a-4a.

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[5] With respect to this holding of the District Court, its reasoning was that the notice to the judgment debtor must say more than simply that there is a right to contest the garnishment by filing a motion asserting a defense or objection. Reigh I, 595 F.Supp at 1555-1556; App. at 154a-155a. It later held that the Fourth Circuit in Reigh I had not overturned that aspect of its decision with respect to information concerning the procedures available to the judgment debtor. Reigh II, App. at 17a. In its decision on the attorney's fees award, the Fourth Circuit did not disturb this finding by the District Court. Reigh II, 829 F.2d at 1336, App. at 4a. The District Court also factually found that the Rules Committee approved this change in their notice on a "permanent" basis, which factual finding the Fourth Circuit upheld. Id. at 1136, App. at 4a.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO WHICH STANDARD TO APPLY WHEN A JUDGMENT ON THE MERITS IN A CIVIL RIGHTS CASE IS AWARDED TO THE DEFENDANT BUT WHERE IT IS CLAIMED THAT THE PLAINTIFF'S LAWSUIT CONTRIBUTED TO CHANGES IN THE DEFENDANT'S BEHAVIOR

A.

The Fourth Circuit Applies The Smith Test, A Revision Of The Bonnes Test

The Petitioners claim that the decision of the Fourth Circuit in Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979), cert. denied, 455 U.S. 961 (1982) conflicts with standards articulated in other circuits as to what constitutes a "prevailing" party for purposes of an award of fees. The Petitioners ignore the fact that the standards set forth in Bonnes have been revised by the Fourth Circuit in later cases. The Fourth Circuit has aligned itself with the "catalyst" theory adopted by the First Circuit in Nadeau v. Helgemoe, 581 F.2d 276, 281 (1st Cir. 1978). [6]

While the Fourth Circuit decision in Bonnes did not include the second prong of the Nadeau test, Bonnes was later modified by the Fourth Circuit in Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980), where the Court stated:

> As we comprehend the rule, to "prevail" a party must establish in an enduring way that he or she was right on a matter in issue and

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[6] The Nadeau Court articulated a two-pronge test: 1) as a matter of fact, the suit must have been a necessary and important factor in achieving the improvements sought; and 2) as a matter of law, the suit must not have been frivolous, unreasonable or groundless. Nadeau v. Helgemoe, 581 F.2d 276, 281 (1st Cir. 1978). This standard was discussed and refined on another occasion by the First Circuit in Coalition for Basic Human Needs v. King, 691 F.2d 597, 598-599 (1st Cir. 1982).

> that the litigation activities served to establish the existence of the right or contributed to an enjoyment of the right. There need not be a formal adjudication in the party's favor; a vindication of rights obtained by a settlement or a consent judgment may be sufficient as may a showing that the plaintiff's actions were a catalyst which caused the defendant to remedy his errant ways.

Id. at 346-347. [7] Further, the Court noted, consistent with the second prong of Nadeau, the legislative history of the relevant fee statute and stated that one goal of such legislation is to deter the bringing of lawsuits without foundation. Id. at 347. [8]

The Fourth Circuit later confirmed its shift to the Nadeau test in Disabled In Action v. Mayor, 685 F.2d 881, 885, n.3 (4th Cir. 1982) ("In our view, plaintiffs became entitled to attorney's fees when they won, by way of a settlement, practical relief on colorable claims.") [9] The

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[7] It is ironic that the Petitioners argue that Bonnes is the standard utilized by the Fourth Circuit in its petition to this Court. On appeal to the Fourth Circuit, the Petitioners argued that the standards set forth in Smith were applicable. See, Brief of Appellants/Cross-Appellees at 15. The Respondents argued that the Court ought to apply Bonnes. See, Brief of Appellees/Cross-Appellants at 17-18. In its decision which is the subject of this petition, the Fourth Circuit cited only to Smith in upholding the award of a small amount of attorney's fees based upon limited success. Reigh II, 829 F.2d at 1335; App. at 3a. The Fourth Circuit, agreeing with the Petitioners as to the applicable law, nevertheless, affirmed the award of fees. The Petitioners never sought a rehearing in the Fourth Circuit on the difference between the Bonnes and Smith standards.

[8] The attorney's fee standards of Title VII at issue in Smith are the same as the standards in §1988. Hensley v. Eckerhart, 461 U.S. 424, 433, n.7 (1983).

[9] The Fourth Circuit decided Disabled In Action after this Court denied certiorari in Bonnes. Long v. Bonnes, 455 U.S. 961 (1982).

Court cited to Bonnes and Nadeau. Id.[10]

Petitioners have, thus, made much ado over nothing. Their argument is simply a snapshot of the state of the law in the Fourth Circuit regarding the "catalyst" theory as of 1979, when Bonnes was decided. They completely ignored the effect of Smith and Disabled In Action.

The Petitioners also claim that the Second and Third Circuits apply the Bonnes test, citing Gerena-Valentin v. Koch, 739 F.2d 755 (2nd Cir. 1984) and N.A.A.C.P. v. Wilmington Medical Center, Inc., 689 F.2d 1161 (3rd Cir. 1982), cert. denied, 460 U.S. 1052 (1983). Petition at 10. This is also a superficial glance at the state of the law in those circuits. The Second Circuit in Gerena relied upon the decision in Nadeau in finding that there was no causal connection and that the case was superfluous. Id. at 758-759; see also, Gingras v. Lloyd, 740 F.2d 210 (2nd Cir. 1984). The Third Circuit did not cite to Bonnes but, instead relied upon Nadeau in its decision in N.A.A.C.P. v. Wilmington Medical Center, Inc., 689 F.2d at 1167. Later, the Third Circuit specifically stated that its standard was consistent with that of Nadeau and with this Court's decision in Hensley v. Eckerhart, 461 U.S. 424 (1983). Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897, 911-912 (3rd Cir. 1985).

Petitioners create further confusion by raising differences between the "significant issue" and "central

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[10]It is interesting to note that one of the Circuit Court judges on the panel in Bonnes (Russell, J.), one of the Circuit Court judges on the panel in Smith (Widener, J.) and one of the Circuit Court judges on the panel in Disabled in Action (Winter, C.J.) comprised the panel which decided Reigh II.

issue" tests which relate to the first prong of the catalyst theory. [11] This apparent conflict is not raised by this case. The Fourth Circuit follows the "significant issue" test later approved by this Court in Hensley v. Eckerhart, 461 U.S. at 433. See, Disabled in Action, 685 F.2d at 885.

B.

Where A Judgment Has Been Entered Against Plaintiff On The Merits, Every Other Circuit Court Has Recognized That Attorney's Fees Are Awardable If The Plaintiff's Lawsuit Caused The Defendant's Behavior To Change In An Enduring Way

Here, the Respondents prevailed to a limited extent and were, accordingly, awarded a limited amount of attorney's fees. The District Court held that the Petitioners "permanently" changed the information in the writ served upon a judgment debtor to include specific information regarding the procedures available to contest an attachment of property. Reigh II, App. at 29a-30a; see, footnote 5, supra.

Where plaintiffs have alleged that their lawsuits have caused the defendant's behavior to change in an enduring way even though judgment was ultimately entered on the merits

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[11] Petitioners correctly recognized that the Fifth, Sixth and Eleventh Circuits have adopted the "central issue test". Uviedo v. Steves Sash and Door Co., 760 F.2d 87, 88 (5th Cir. 1985), cert. denied, 106 S. Ct. 791 (1986) (six judges dissented from the denial of rehearing en banc and argued that the "central issue test" conflicts with Hensley); Kentucky Association for Retarded Citizens, Inc. v. Conn, 718 F.2d 182 (6th Cir. 1983); Taylor v. City of Ft. Lauderdale, 810 F.2d 1551 (11th Cir. 1987).

against them, every Circuit Court dealing with this issue has recognized that attorney's fees are awardable if the "catalyst" standard is met. Gingras v. Lloyd, 740 F.2d 210, 212 (2nd Cir. 1984); Ross v. Horn, 598 F.2d 1312, 1322 (3rd Cir. 1979), cert. denied, 448 U.S. 906 (1980); Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897, 912 (3rd Cir. 1985); Hennigan v. Ouachita Parish School Board, 749 F.2d 1148, 1152-53 (5th Cir. 1985); Fiarman v. Western Publishing Co., 810 F.2d 85, 86 (6th Cir. 1987); Janowski v. International Brotherhood of Teamsters Local No. 710, 812 F.2d 295, 297-98 (7th Cir. 1987); Greater Los Angeles Council on Deafness v. Community Television of Southern California, 813 F.2d 217, 219-20 (9th Cir. 1987); see also, United Handicapped Federation v. Andre, 622 F.2d 342, 345-46 (8th Cir. 1980) (fees awardable where summary judgement on the merits entered in favor of defendants but parties later entered into a settlement stipulation). [12]

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[12] Some courts have stated that a plaintiff cannot win attorney's fees while losing on the merits. Turner v. McMahon, 830 F.2d 1003 (9th Cir. 1987); Merkil v. Scovill, 787 F.2d 174 (6th Cir. 1986), cert. denied, 107 S. Ct. 585 (1986); Harris v. Pirch, 677 F.2d 681 (8th Cir. 1982); Ryan v. Mansfield State College, 677 F.2d 354 (3rd Cir. 1982). In none of these cases, however, did the plaintiff ever allege that the lawsuit caused changes in the behavior of the defendant. Other courts have held that if the change in the defendant's behavior only resulted because of an interium procedural order entered during the pendency of the lawsuit or that any change did not endure judgment, attorney's fees were not warranted. Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980); Palmer v. City of Chicago, 806 F.2d 1316 (7th Cir. 1986), cert. denied, 107 S. Ct. 2180 (1987); Jensen v. City of San Jose, 806 F.2d 899 (9th Cir. 1986) (en banc); Doe v. Busbee, 684 F.2d 1375 (11th Cir. 1982).

II.

THE FOURTH CIRCUIT DECISION DOES NOT CONFLICT WITH THIS COURT'S HOLDING IN HEWITT V. HELMS NOR WITH THE POLICY BEHIND 42 U.S.C. §1988

In Reigh II, the Fourth Circuit held that this Court's recent decision in Hewitt v. Helms, ____ U.S. ____, 107 S. Ct. 2672 (1987), supports its decision. Reigh II at 1335; App. at 3A-4A. [13] The Fourth Circuit then recognized, in upholding the decision of the District Court, that the Respondents' suit achieved a limited change in the notice actually given to the judgment debtor and that they were prevailing parties to a limited extent. Id. [14]

The Petitioners rely upon Kentucky v. Graham, 473 U.S. 159 (1985) to support its claim that a completely successful defendant should not have to pay a completely

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[13] This Court held that a plaintiff who did not obtain any beneficial action (as opposed to simply a beneficial judgment) from the defendant cannot be awarded fees. Hewitt v. Helms, 107 S.Ct. at 2676. "Redress is sought through the court, but from the defendant." Id. A favorable judicial statement of law by an appellate court which does not result in a declaratory judgment nor a beneficial change in the defendant's behavior is insufficient. Id. at 2677. This Court, recognizing the possible applicability of the "catalyst" theory regarding a change in behavior which the defendant did make, held that the plaintiff had been released from prison and that his return to prison sometime later was a mere "fortuity." Id.

[14] The Respondents in this case have at all times continued to be judgment debtors and have, at all times, been subject to the possibility of future attachments of property in the hands of third persons, most notably bank accounts. The claims of the Respondents have not become moot throughout the pendency of this matter. Reigh I, 784 F.2d at 1194; App. at 46a; see, Juidice v. Vail, 430 U.S. 327, 322-333, n.9 (1977); Grimes v. Miller, 429 F.Supp. 1350 (M.D. N.C. 1977), aff'd, 434 U.S. 978 (1978); Harris v. Bailey, 675 F.2d 614, 616 (4th Cir. 1982). There is no mere "fortuity" here as existed in Hewitt. The Petitioners' claim that the Respondents cannot benefit from the changes in the amended rules of procedure is therefore specious. See, Petitioner's Brief at 20, n.12.

unsuccessful plaintiff any attorney's fees.[15] Petitioners erroneously rely on that case since it dealt only with the issue of whether fees can be obtained against the state depending upon whether the officials are sued in their personal, as opposed to official capacities. Id. In fact, this Court expressly limited its holding by stating: "We express no view as to the nature or degree of success necessary to make a plaintiff a prevailing party." Id. at 165, n.9.

The legislative history of §1988 clearly contemplates an award of fees in this instance.[16] Further, there is no common sense or policy reason to award fees where the plaintiff meets the Nadeau test although the case was dismissed as moot due to changes in the defendant's behavior but

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[15]Respondents agree that a totally unsuccessful plaintiff should not recieve attorney's fees. But the Respondents were successful in obtaining a declaration by the District Court that the old rules of procedure in Maryland which provided no notice whatsoever before, at the same time or at any time after the attachment of a bank account containing exempt funds were unconstitutional as well as ultimately obtaining changes in the actual content of the notice, a change which the District Court found factually to be "a permanent one". App. at 150a, 29a-30a. This factual finding was upheld. Reigh II at 1336; App. at 4a. The District Court holding that the lawsuit itself did not cause the changes between the original rules and the amended rules is a legal conclusion and is the subject of Respondents' Cross-Petition for Certiorari.

[16]The House Report indicates that a person may in some circumstances be a "prevailing party" without having obtained a favorable "final judgment following a full trial on the merits." H.R. Rep. No. 94-1558, p. 7 (1976); see also, S. Rep. No. 94-1011, p. 5 (1976); Hanrahan v. Hampton, 446 U.S. 754, 756-757 (1980).

to deny fees in the instant case. [17] The only distinction is the Respondents here believed that due process required more, pursued the issue, but eventually lost on that point on appeal. The amount of the award may be smaller in the latter situation but some award is certainly appropriate.

III.

AN AWARD OF ATTORNEY'S FEES IS NOT BARRED BY THE ELEVENTH AMENDMENT

The Petitioners' argument on this issue is a red herring; one which the Fourth Circuit wisely ignored. [18] 42 U.S.C. §1988 abrogates sovereign immunity and allows an award of attorney's fees in any action or proceeding to enforce §1983 if the plaintiff "prevails." Thus, if a plaintiff files an action to enforce §1983, whatever the final disposition of the case, the plaintiff need only show that he or she has "prevailed." The standard governing when one "prevails" was discussed above and is the issue to be focused upon.

Petitioners allege that the Attorney's Fees Act overrides the state's immunity only if the action is one in

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[17] None of the circuit courts dealing with this issue has held that a dismissal of the case as moot is an impediment to an award of fees. Exeter-West Greenwich Regional School District v. Pontarelli, 788 F.2d 47 (1st Cir. 1986); Durett v. Cohen, 790 F.2d 360 (3rd Cir. 1986); Robinson v. Kimbrough, 652 F.2d 458 (5th Cir. 1981); Johnston v. Jago, 691 F.2d 283 (6th Cir. 1982); Gekas v. Attorney Registration & Disciplinary Com'n, 793 F.2d 846 (7th Cir. 1986); Fitzharris v. Wolff, 702 F.2d 836 (9th Cir. 1983); Supre v. Ricketts, 792 F.2d 958 (10th Cir. 1986); Maloney v. City of Marietta, 822 F.2d 1023 (11th Cir. 1987).

[18] This contention was raised on appeal. Appellants'/Cross- Appellees' Brief at 12-14.

which the plaintiff actually secures rights within the meaning of §1983, that is, wins on the merits. Petition at 24. Such a claim does not survive the actual language of 42 U.S.C. §1988 as shown above nor the legislative history. [19]

Such a claim flies in the face of the holdings of this Court. North Carolina Department of Transportation v. Crest Street Community Council, Inc., 479 U.S. _____, 107 S. Ct. 336, 341-342 (1986) (at a minimum, a party may be awarded fees if there is an out-of-court settlement or the defendant voluntarily ceases the unlawful practice); Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (a party can "prevail" if it succeeds on any significant issue which achieves some benefit, endorsing the Nadeau standard); Maher v. Gagne, 448 U.S. 122, 131-133 (1980) (the Court rejected the argument that the Eleventh Amendment bars an award of fees when the plaintiff settled the case favorably where both a statutory and constitutional claim were involved and even where the plaintiff prevailed on a wholly statutory, non-civil rights claim (for which fees cannot be awarded) which was coupled with a substantial constitutional claim). Most recently, this Court stated that:

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under §1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment - e.g., a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurrs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

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[19] See, footnote 16, supra.

Hewitt v. Helms, __ U.S. __, 107 S. Ct. 2672, 2676 (1987).[20]

Suffice it to say that the Petitioners mix apples and oranges by raising the Eleventh Amendment as a legal bar when what they are really complaining about again is the mere fact that they obtained a judgment on the merits and believe this ipso facto bars any award of fees. Thus, their Eleventh Amendment argument adds nothing to their request for review and the Court should disregard it.

CONCLUSION

There is no clear conflict among the Circuit Courts in light of revisions to the Bonnes test endorsed by the Fourth Circuit. The Fourth Circuit decision does not conflict with this Court's holding in Hewitt v. Helms. Finally, there is no Eleventh Amendment bar to the award of fees under §1988. For these reasons, the modest award of

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[20]The Petitioners again rely upon this Court's decision in Kentucky v. Graham, 473 U.S. 159 (1985). As stated above, that decision only raised the issue of whether fees can be awarded against the state where a plaintiff obtains a settlement in a damage action filed against government employees in their personal capacities. On the contrary, here, only injunctive and declaratory relief was sought and the clerks were only sued in their official capacities.

fees was not improper.[21] The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[21] Respondents state this even though they are filing a Cross-Petition because they believe most strongly that review by this Court is unnecessary and are willing to live with an award of fees of $2,409.20 for the time spent on the merits in the District Court. If this Court grants review, Respondents believe that a Cross-Petition is important to allow review of all of the District Court's decision as, legally, more fees should have been awarded.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29 day of January, 1988, one copy of the foregoing document was mailed, postage prepaid, to Ralph S. Tyler, Assistant Attorney General, 7 North Calvert Street, 2nd Floor, Baltimore, Maryland 21202.

Elizabeth Renuart

No. 87-1102

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHARLES L. SCHLEIGH, *et al.*,
Petitioners,

v.

ESTHER V. REIGH, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE STATES OF NORTH CAROLINA, SOUTH CAROLINA, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Civil Rights Attorney's Fees Act, 42 U.S.C. §1988, authorize the award of fees against a State found not to have violated federal law?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes and Rules

No. 87-1102

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October Term, 1987

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INTEREST OF AMICI CURIAE

Amici are States within the geographical jurisdiction of the United States Court of Appeals for the Fourth Circuit.[1] Amici are frequent litigants in the federal courts

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[1] Because this brief is filed on behalf of States, by their respective attorneys general, consent to its filing is not required. See Sup. Ct. R. 36.4.

within the Fourth Circuit in actions in which they are subject to claims under the Civil Rights Attorney's Fees Act, 42 U.S.C. §1988. Thus, amici have an acute interest in and are affected directly by the "prevailing party" standard applied in the Fourth Circuit.

Since the decision in Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979), cert. denied, 455 U.S. 961 (1982), the rule in the Fourth Circuit has been that a plaintiff is a "prevailing party" entitled to attorney's fees under the Attorney's Fees Act if the plaintiff's lawsuit caused the defendant to change his conduct, even if that change is not required as a matter of law. Amici contend that this standard is inconsistent with both the intent of the Attorney's Fees Act and with States' Eleventh Amendment immunity in federal court. Because the Fourth Circuit's rule results in amici paying attorney's fees even in cases where state

law, practice, or policy do not violate federal law, amici respectfully request this Court to grant the petition and review the decision in this case.

STATEMENT OF THE CASE

Plaintiffs challenged the constitutionality of Maryland's post-judgment attachment rules. While the district court declared those rules unconstitutional, Reigh v. Schleigh, 595 Supp. 1535 (D.Md. 1984), the Fourth Circuit upheld the rules and reversed the district court, 784 F.2d 1191 (1986), and this Court denied certiorari, 107 S.Ct. 167 (1986) ("Reigh I"). Notwithstanding the fact that Maryland prevailed in Reigh I, the district court then ordered the State to pay plaintiffs' attorneys' fees, and the Fourth Circuit affirmed that fee award. Reigh v. Schleigh, 829 F.2d 1234 (1987) ("Reigh II"). The petition seeks review of the propriety of the award of attorneys' fees

against the State in a case that the State won.

REASONS FOR GRANTING REVIEW

I. The "Prevailing Party" Standard Applied In the Fourth Circuit Is In Conflict With The Standard Applied In Other Circuits.

The Fourth Circuit applies a different and substantially more expansive prevailing party standard than that applied in other federal circuits. This fact was noted by Chief Justice Rehnquist, joined by Justice O'Connor, dissenting from the denial of certiorari in Long v. Bonnes, 455 U.S. 961 (1982), and has been noted in opinions of the Fourth Circuit and of district courts within that circuit.[2]

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[2] See Young v. Kenley, 614 F.2d 373 (4th Cir. 1979) (reversing denial of attorney's fees, the district court having based its decision on Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978), and remanding for reconsideration in light of Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979)); ECOS, Inc. v. Brinegar, 671 F.Supp. 381, 390 n.3 (M.D.N.C. 1987) ("Other circuits approach this [previaling party] con't

This sharp conflict in the circuits on an important question of federal law is reason enough for this Court to grant the petition. See Sup. Ct. R. 17.1(a). Here, the need for review is particularly great. As this case graphically illustrates, the Fourth Circuit interprets the prevailing party standard so broadly as to permit the award of attorneys' fees to plaintiffs who sued the State and lost.

II. The Fourth Circuit's Decision Is Inconsistent With Both The Intent Of The Attorney's Fees Act And With State's Eleventh Amendment Immunity In Federal Court.

In City of Riverside v. Rivera, 106 S.Ct. 2686, 2695-98 (1986), this Court

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problem differently than the Fourth Circuit."); Young v. Kenley, 485 F.Supp. 365, 366-70 (E.D.Va. 1980) (comparing and contrasting the Fourth Circuit's Bonnes test with the First Circuit's Nadeau test), reversed, 641 F.2d 192 (4th Cir. 1981), cert. denied, 455 U.S. 961 (1982); Gillespie v. Brewer, 602 F.Supp. 218, 224 (N.D.W.Va. 1985) (noting difference between Bonnes standard and Nadeau standard).

reviewed in some detail the legislative history and purpose of the Attorney's Fees Act. As that review makes clear, Congress intended that fees should be awarded to those whose actions enforce the civil rights laws.[3] Most certainly, that purpose is not served by the fee award in this case.

On the merits, the square holding in Reigh I was that plaintiffs were not victims of civil rights violations; therefore, they did not enforce the civil rights laws. Thus, to hold that plaintiffs who lost are prevailing parties entitled to fees distorts both the plain language and the manifest intent of the Attorney's Fees Act. See

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[3] See id. at 2695 ("Congress enacted §1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process."); id. at 2696 ("Congress enacted §1988 specifically to enable plaintiffs to enforce the civil rights laws. . . ."") (emphases added).

Hewitt v. Helms, 107 S.Ct. 2672, 2675 (1987) ("Respect for ordinary language requires that a plaintiff receive at least some relief before he can be said to prevail."). [4]

Here, however, because fees were awarded against a State, [5] the error goes even deeper. States are, of course, entitled to Eleventh Amendment immunity in federal court. Pennhurst State School and Hospital v. Haldeman, 465 U.S. 89 (1984). While that

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[4] In Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978), this Court held that before a "prevailing defendant" would be awarded attorney's fees, he would have to show that plaintiff's action was frivolous. Consistent with that approach, the plaintiff should be required to "win" - or at least not, as here, "lose" - before he is entitled to fees.

[5] Plaintiffs' complaint sought declaratory and injunctive relief against three defendants, all of whom were sued in their respective official capacities as clerks of Maryland trial courts. See Petition for Certiorari at 23 n.15. Unquestionably, therefore, this is an action against the State of Maryland. Hutto v. Finney, 437 U.S. 678, 700 (1978).

immunity was overridden by the Attorney's Fees Act, Hutto v. Finney, 437 U.S. 678 (1978), the predicate for overriding the State's immunity to attorney's fees orders is a state law, policy, or action that violates federal law. In Reigh I, the Fourth Circuit held that the State's rules did not violate federal law.

This case raises fundamental questions of legislative intent. Those questions include (1) whether Congress intended to authorize the award of attorneys' fees in a case where the district court's decision granting relief to plaintiffs was reversed in its entirety and final judgment was entered dismissing plaintiffs' complaint with prejudice, and (2) whether Congress intended to override the State's Eleventh Amendment immunity and subject it to a federal court

order imposing attorneys' fees in a case which the State won. These questions are of sufficient importance to warrant review of this case.

III. Because The Attorney's Fees Act Plays A Central Role In Much Of The Major Litigation In Which Amici And All States Are Involved, This Court Should Grant Review To Clarify The Standard To Be Applied In Determining Whether A Plaintiff Is Entitled To Fees.

In literally every case in which amici or one of their officials are sued for an alleged violation of one of the statutes enumerated in the Attorney's Fees Act,[6] potential liability for plaintiff's counsel's fees becomes a major litigation consideration. By virtue of the holding below, amici are confronted with the rather extraordinary prospect of paying fees even in cases where

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[6] The statutes enumerated in the Fees Act which may give rise to an award of attorney's fees are 42 U.S.C. §§1981, 1982, 1983, 1985, 1986, title IX of Public Law 92-318, and title VI of the 1964 Civil Rights Act.

their laws and policies are found not to have violated any of the statutes enumerated in the Fees Act. This rule will have a substantial adverse fiscal impact on amici and it places them at a truly unfair litigation disadvantage.

Because the Fourth Circuit's rule in this case is that prevailing does not, as a matter of law, assure that States will not be liable for plaintiff's attorney's fees, States must consider seriously the settlement of cases even if their best judgment is that their legal position will prevail. This Court should decide whether Congress intended this result.

CONCLUSION

For the reasons stated herein and in the petition, amici respectfully urge this Court to issue a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

No. 87-1102

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

REPLY ARGUMENT

RESPONDENTS' ARGUMENT IS INCORRECT: THE "PREVAILING PARTY" STANDARD APPLIED BY THE FOURTH CIRCUIT IS IN SHARP CONFLICT WITH THE STANDARD APPLIED IN THE MAJORITY OF FEDERAL CIRCUITS.

Respondents' principal argument is that there is no conflict among the circuits as to the "prevailing party" standard under the Civil Rights Attorney's Fees Act, 42 U.S.C.

§1988. See Brief in Opp. at 4-8. Specifically, respondents claim that "[t]he Fourth Circuit has aligned itself with the 'catalyst' theory adopted by the First Circuit in Nadeau v. Helgemoe, 581 F.2d 275, 281 (1st Cir. 1978)." (Brief in Opp. at 4) (footnote omitted).

Respondents' argument ignores the lengthy memorandum of Chief Justice Rehnquist, joined by Justice O'Connor, dissenting from the denial of certiorari in Long v. Bonnes, 455 U.S. 961 (1982)(noting that the prevailing party standard applied in the Fourth Circuit is in conflict with the First Circuit standard in Nadeau).[1] Further, respondents' argument is flatly refuted by

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[1] That dissent, which post-dates the Fourth Circuit's decision in Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980), refutes respondents' claim that the Fourth Circuit is now in harmony with the First Circuit because "[t]he Fourth Circuit applies the Smith test, a revision of the Bonnes test." (Brief in Opp. at 4).

the clear holding of Young v. Kenley, 614 F.2d 373 (4th Cir. 1979), where the Fourth Circuit reversed the district court's denial of attorney's fees based upon Nadeau and remanded for reconsideration in light of Bonnes, and is also refuted by recent district court decisions within the Fourth Circuit. See ECOS, Inc. v. Brinegar, 671 F.Supp. 381, 390 n.3 (M.D.N.C. 1987) ("Other circuits approach this [prevailing party] problem differently than the Fourth Circuit."); Gillespie v. Brewer, 602 F.Supp. 218, 224 (N.D.W.Va. 1985) (noting difference between the Fourth Circuit Bonnes standard and the First Circuit Nadeau standard).[2]

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[2] This split in the circuits was also noted explicitly in a recent decision of the Fifth Circuit. See Hennigan v. Ouachita Parish School Board, 749 F.2d 1148, 1151 and n.15 (5th Cir. 1985) (citing Nadeau in the text as the standard "adopted by the majority of circuits" and contrasting it with the Bonnes standard cited in the footnote).

Maryland's petition in this case is supported by three other states in the Fourth Circuit (North Carolina, South Carolina, and West Virginia). See Brief of Amici Curiae in Support of Petition.[3] That is strong evidence that petitioners have not, as respondents claim, "made much ado over nothing." (Brief in Opp. at 6.)

In the district court, respondents' argument was just the reverse of their present argument. There, respondents argued (and, indeed, correctly so) that the Nadeau standard "is stricter than that required by the Fourth Circuit" and they sought comfort in the less strict Fourth Circuit standard. See Plaintiffs' Response to Defendants'

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[3] Amici join Maryland in seeking review of this case because the Fourth Circuit standard is at odds with the standard applied in the majority of circuits and because the Fourth Circuit standard is inconsistent with the intent of the Attorney's Fees Act. See Brief of Amici Curiae, passim.

Opposition to Motion for Award of Attorney's Fees at 17.[4]

In sum, there is no merit to respondents' claim of harmony and alignment between the Fourth Circuit and the majority of federal circuits on the "prevailing party" standard under the Attorney's Fees Act. As was the

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[4] In the district court, respondents distinguished the "stricter" Nadeau standard from that of Bonnes as follows:

> The court in Bush [v. Bays, 463 F.Supp. 59 (E.D.Va. 1978)], to deny fees, applied the standard articulated by the [court in] Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978). In addition to the factors set forth in Bonnes, the First Circuit requires the plaintiff to establish that the defendant did not act gratuitously in changing its conduct. Id. at 281. This standard is stricter than that required by the Fourth Circuit. See Bonnes v. Long (sic), 455 U.S. 961, 966-67 (1982) (dissenting opinions to denial of cert. of Rehnquist, J. and O'Connor, J.)

Plaintiffs' Response to Defendants' Opposition to Motion for Award of Attorney's Fees at 17 (emphasis added).

case in Long v. Bonnes, the Fourth Circuit has again "rendered a decision in conflict with the decision of another federal court of appeals on the same matter. . . ." Sup. Ct. R. 17.1(a). Review by this Court to resolve this now long-standing conflict on an important question of federal law is warranted.

CONCLUSION

For the reasons stated herein and in the petition, this Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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